NO. 100

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1926.

THE UNITED STATES,
Appellant,

vs.

BURTON COAL COMPANY,
Appellee.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF ON BEHALF OF BURTON COAL COMPANY.

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The questions.

According to the express statement in appellant's brief (p. 2) the specific question is whether the Court of Claims applied the proper measure of damages by using the computation and amount fixed in Finding XVI (R. 35) in its Conclusion of Law (R. 36) and the Judgment (R. 39) instead of the measure of damages and amount fixed in Finding XIX (R. 36).

But appellant in the summary of argument in its brief (p. 6) refuses to concede that the termination of the contract was improper and constituted a (repudiation) breach of contract. Here then is a second question.

Furthermore, in its brief, appellant (R. 7) argues that appellee cannot recover from appellant (they are the only

two parties to the contract) the damages suffered by the Mining Companies (not parties to the litigation), which had contract relations with appellee but none with appellant, because it is not shown what if anything appellee was compelled to pay the mining companies because of appellant's attempted concellation (repudiation) of the contract. It is argued by appellant in the statement in its brief (R. 4) that as to one mining company at least appellee is a mere broker, as held by the Court of Claims in its first opinion (appellant's brief p. 5). There are then really five principal comprehensive questions:

I. Did appellant lawfully cancel or did it breach or repudiate its contract and prevent its performance by appellee?

II. If appellant is guilty of breach of contract what is the measure and sum of appellee's damages?

III. Under the contract and particular facts of this case was appellee a principal, and the sole and only party to it, other than appellant, or merely a broker, factor or other agent for certain designated coal mining companies.

IV. If appellee under the contract is only a factor or other agent for the mining companies, can it not nevertheless recover all the damages suffered by it and the mining companies in an action in its own name, for appellant's breach, which damages are the difference between the contract price of coal and its market price at the place and time of delivery or at the date of repudiation. And there is still another question arising under the contract:

V. Is appellee under the contract and facts in this case confined to the measure and amount of damages prescribed in the arbitration and liquidation damages (penalty) clauses of the contract?

The above questions II-V inclusive are all questions of damages.

Supplemental statement.

In addition to the facts found by the Court of Claims recited in appellant's brief (pp. 2-4), that Court also found among other facts the following:

On account of the rejection by the Quartermaster General's Office of bids for furnishing coal to the War Department, for the fiscal year 1920-21, because they were excessive, up to August 1920 no provision had been made for coal for Army posts in the *"Chicago district"* for that year. In this emergency, and as a result of interviews and negotiations between Lieut. Col. Barney of the Quartermaster General's Office, and Lieut. Herbert Barr, Assistant Purchasing Officer of the Quartermaster Supply Office at Chicago, representing appellant, and Fred A. Burton and L. A. MacDonald, President and Vice-President respectively of appellee, a contract was made under date of September 10, 1920, between appellee and appellant, the latter acting through the said Lieut. Barr as its Contracting Officer for the purchase from appellee by appellant of 150,000 tons of bituminous coal at $6.75 per ton f. o. b. cars at designated mines in southern Illinois. *The contract was drafted by officers or agents of appellant.*

During the negotiations resulting in the execution of said contract, appellee's officers informed Col. Barney and Lieut. Barr they did not particularly care for Government business, but they were assured by Col. Barney that appellant would take the coal and pay for it promptly. On August 5, 1920, an oral understanding was reached between appellee's officers and the said Barney and Barr as to the terms for furnishing 150,000 tons of coal by appellee, and pursuant to their request for a confirmation by appellee of this understanding, appellee on the following day, (August 6th) wrote Lieut. Barr in substance as follows: (R. 23)

"(1) Coal will be produced at the White Ash mine of the *Johnston City Washed Coal Company,* at Paradise mine of the *Forester Coal and Coke Company,* and at the Freeman mine of the *Freeman Coal Mining Company.*"

(2) Appellee required that the formal contract should reserve the right to ship *from other neighboring mines* coal of substantially the same quality and value as that produced at the specified mines.

(3) Appellant to supply the cars so that such cars would not be counted against the producer in the distribution of coal car equipment, but to be in addition to the equipment supplied by carriers in the ordinary course. "*This condition is fundamental.*"

"(4) *Delivery* is to be made in *substantially* equal weekly quantities from August 15, 1920 *to February* 15, 1921. But we are not obliged to make any delivery *unless and until cars are furnished as above stated and only so long as they are furnished.*" (R. 23)

"(5) The cars are to be furnished so that *delivery can be made as above specified.* If the full quota of cars are not furnished during any one or more weeks, then we shall not be bound to make up the deficiency during subsequent weeks. *But we shall do so if we can do so without loss.* We are to specify the days of each week for the loading of this coal", etc. (R. 23-24.)

"(6) The price is to be $6.50 per ton f. o. b. mines, which is the place of delivery."

"(9) The price named is based on the present scale of wages paid to mine employes. In case of any change in the wage scale the price is to be changed accordingly."

To the above confirmation or proposition a postscript is attached naming the different railroads which serve the three described mines and stating that appellee reserves

"the rights *to shift the tonnage* and to supply coal *from other mines* in the same district." (R. 24)

On *August* 24, 1920, Lieut. Barr wrote appellee, referring to appellee's proposition of August 6, 1920, to sell 150,000 tons of coal, that "2. *The above proposition has been accepted, and will expect you to make shipments as soon as necessary arrangements can be made to furnish cars, shipping instructions to be made by this office later.*"

"3. Contract is being drawn up and will be furnished you for signature within the next few days." (R. 24)

On *September* 27, 1920, Lieut. Barr wrote appellee enclosing a copy of the written contract of *September* 10, 1920, and said: "1. Enclosed is contract for 150,000 tons coal, to be shipped in *approximately five months.*" (R. 24)

The letter also gave appellee the billing for these cars when loaded, which billing was to continue until further notice. (R. 25)

"Schedule A" which formed a part of the contract of September 10, 1920, specified the three mines at White Ash, Freeman and Paradise, Illinois, as the delivery points, and provided for the delivery of mine-run bituminous coal. "Total price $1,012,500.00"; specified the tonnage from each mine and the railroads and "9. Schedule of deliveries, *approxmiately* 1600 tons per week from White Ash, Ill.; *approximately* 2,000 per week from Paradise, Ill.; *approximately* 2500 tons per week from Freeman, Ill." *Shipping directions* were to be issued by the Depot Quartermaster, Chicago, Ill. "14. Bond, $105,000.00." The special attention of the contractor was called to the fact that it was the purpose of the War Department to "exact a fulfillment of all contracts as to the *time periods*" (R. 25), and that the contractor "*need not expect to be relieved* from these conditions." (R. 25-26).

It is then expressly stated (R. 27) "Provisions of this contract depend upon the Government furnishing cars at mines indicated above."

"The said bond of $105,000.00 required by foregoing Schedule A. of the contract was furnished", by appellee (R. 27.)

"Between the time of the plaintiff's proposal of August 6th specifying the price of $6.50 per ton, and the execution of the written contract of September 10th, there was an increase of 25 cents per ton allowed in the price of coal on account of increase in miners' wages, which increased the contract price to the $6.75 per ton stated in the contract." (R. 27)

The general printed provisions of contract of September 10, 1920, contained among others, the following provisions (R. 27):

> "*Section* 2. Termination in public interest: If, in the opinion of the *Quartermaster General,* the public interest shall so require, this contract may be terminated by the United States by 15 *days' notice* in writing from the contracting officer to the contractor, and such termination shall be deemed to be effective *upon the expiration of* 15 *days after the giving of such notice", etc.* (R. 28.)

There are various clauses in "Schedule A" of the contract (R. 26) and in the general provisions of the contract (R. 10-11, 15, 28-29) for the settlement of disagreements, claims and disputes under the contract, by the Secretary of War or by Boards of Arbitrators or Appraisers.

There is no finding by the Court of Claims that appellant ever invoked, or took any steps under, these arbitration or liquidated damage (penalty) clauses, if they may be termed such.

A complete copy of the contract of September 10, 1920 (and also of "Schedule A") which is made a part of Finding II by the Court of Claims (R. 22) is attached to appellee's pleading. (R. 6-21).

The contract provides that it *is "entered into as of the* tenth day of September, 1920, between H. Barr, 1st Lieut. Quartermaster Corps, United States Army, located at 1819 W. 39th St., Chicago, Ill., (herein called contracting officer'), *acting by authority of the Quartermaster General of the Army* (herein called 'Quartermaster General'), and under direction of the Secretary of War, for and in behalf of the United States of America", etc.

It is stated in Article 1 "(b) The term *'Quartermaster General'*, when used herein, shall mean the Quartermaster General or Acting Quartermaster General of the Army as constituted at the particular time." (R. 6)

Section 2, the termination clause of the contract is set out in full on pages 10-11 of the transcript of record.

The contractor is required whenever requested, to furnish to the *Quartermaster General* or such person designated by him, statements, reports and information as to performance of the contract. The authority is given to the *Quartermaster General* to prescribe the regulations under which the progress of the performance of the contract is to be ascertained by agents of appellant. (R. 16).

"22. *Waiver*: *No provisions of this contract shall be deemed waived without express consent in writing signed by the party charged with the waiver.*" (R. 17, 29).

"Both *prior to* and following the execution of the written contract of September 10, 1920", appellee shipped coal to various points in accordance with appellant's shipping instructions. (R. 30)

December 6, 1920, Major Norris Stayton, Purchasing Officer Depot Quartermaster's Office at Chicago, the immediate superior of Lieut. Barr (R. 30), wrote appellee with reference to the contract confirming a telephone conversation "to the effect that at the present time there is no place

where any of this undelivered portion can be shipped. It is *hoped,* however, that the remainder of this contract may be shipped *prior to the expiration date.*" (R. 31)

January 12, 1921, Major Stayton wrote requesting appellee to discontinue all coal shipments to Fort Des Moines until further notice. (R. 31)

February 5th following, Major Stayton wrote appellee to forward records showing quantity of undelivered coal.

February 9th in reply, appellee wrote Major Stayton that 100,000 tons of coal was still unshipped "*on which we are awaiting shipping instructions.*" (R. 31.)

On the same date Major Stayton wrote appellee *requesting "that all shipments of coal on above cotnract be stopped until further notice from this office."*

March 9, 1921, Capt. C. A. Radcliffe, who had succeeded Lieut. Barr in the Chicago office, under the direction of Major Stayton, his chief, wrote appellee as follows with reference to the contract:

"There is enclosed herewith letter of cancellation covering the undelivered coal (approximately 96,435 tons)" etc. (R. 31)

"The letter of cancellation" enclosed with the above letter to appellee, was dated March 7, 1920 and also signed by Capt. Radcliffe, and stated that due to the "limited appropriation" available for the purchase of coal and "to the fact that *no further calls will be made for delivery* on contract * * * dated September 10, 1920 * * * the undelivered portion (approximately 96,435 tons) of bituminous mine-run coal at $6.75 a ton is *hereby cancelled.*" (R. 32)

Both during and subsequent to the foregoing correspondence, appellee was orally informed by appellant's officers having charge of the performance of the contract, that appellant was not then able and probably would not

be able to take the remainder of the 150,000 tons of coal specified in the contract "and especially because of lack of storage facilities." "It does not appear that either the *Quartermaster General* or the Acting Quartermaster General ever rendered or expressed an opinion, or made any statement to the contracting officer at Chicago, that the public interest required said contract to be terminated; nor does it appear that they ever had the cancellation of the contract under consideration, or had any correspondence with Major Stayton between November 1, 1920, and March 9, 1921, with reference to cancelling it." (R. 32)

The reasons for the attempted cancellation of the contract by appellant were: "A reduction in the quantity of coal needed, on account of mild winter weather, and probable overestimates of post Quartermasters of their needs, with a resulting accumulation of coal, and lack of storage facilities necessary to store the coal, so as to prevent its deterioration; and also desire to apply to other needs of the service such of the available appropriation as was not needed for the purchase of necessary coal, before the appropriation lapsed by expiration of the time limit for its use." (R. 32)

These reasons were not communicated to the appellee otherwise than appears from the correspondence and facts above set forth. (R. 33)

"The Government was unable to provide cars in time for the shipment of said coal, and cars were furnished by plaintiff of the said mines from the cars allotted them for regular commercial shipments." (R. 33)

"The Emmons Coal Company of Philadelphia, Pa., during the period between September, 1920, and March 7, 1921, was supplying coal to the Government in the *Chicago District*. It was given a semiofficial position and designated *by the Quartermaster General's Office* as the *purchasing agent of the Quartermaster General* to obtain and furnish coal for

posts in the entire United States. This arrangement or authorization by the Government was made *subsequent to September* 10, 1920, and said Emmons Coal Company supplied to Camp Grant, Illinois, and Jefferson Barracks, St. Louis, Mo., a total of 170,626 *tons prior to March* 9, 1921, at a price of $5.50 per ton.

Camp Grant and Jefferson Barracks were two of the largest posts in the *Chicago District.*" (R. 33.)

The Court of Claims in Finding XIV (R. 34) sets out the contract between appellee and Freeman Coal Mining Company entered into August 6, 1920, by appellee "pursuant to its said agreement with Lieutenant Colonel Barney and Lieutenant Barr as to the terms of the said contract executed on September 10 following."

Appellee, of course, insists that the Freeman contract with appellee has no place in the record and that what the terms of this contract were is wholly irrevelant and immaterial in litigation *between appellant and appellee* concerning a contract *between appellant and appellee.* The Freeman contract recites (R. 34) that appellee "and Freeman Coal Mining Company, have made a proposition to the United States Government for the sale of coal as per Exhibit A attached and made a part hereof." The quoted statement is false and the Court of Claims finds (R. 35) "The proposition referred to in the first paragraph of this contract and attached thereto as Exhibit A, was the plaintiff's said letter of August 6, 1920, set forth in Finding III."

The letter last referred to was signed only by appellee. (R. 24)

Beginning about December 1, 1920, the market price of coal began to decline until during the period from February 9 to March 9, 1921, the market price of mine-run bituminous coal at the three specified mines was $2.15 per ton. The difference between the contract price of $6.75 per ton and its

market value at the three mines, from February 9 to March 9, 1921, was as stated in appellant's brief (p. 5) $4.60 per ton, or a total of $445,528.40 (R. 35) for which amount the Court of Claims entered judgment in favor of appellee upon the findings of fact. (R. 36, 39) See 60 Ct. Cls. 294.

Appellee's second amended petition sets out among other things; (5) that the contract "did not specify therein the date of its expiration but that *by its terms,* especially in reference to the quantities and times of delivery *which are stated* in said contract *approximately,* said contract expired on, *to wit,* the 1st day of March, 1921, and that up to and including, *to wit,* the 1st day of March, 1921, both the parties to said contract treated it as remaining in full force and effect; that on, *to wit,* the 9th day of March, 1921, said contract was repudiated, renounced and abandoned by the United States by written notice;" that appellee made no oral or written response to the written notice of March 9, 1921, but remained silent and elected to sue under said contract to recover its damages for breach of contract by appellant. (Rec. 2.)

The petition alleges breach of contract by appellant in declining and failing to give shipping instructions for all of the coal, although often requested so to do. (R. 2); that appellant failed to perform because at no time between September 10, 1920 and March 9, 1921, did it furnish any cars for the transportation of coal delivered by appellee under the contract, and appellee to comply with appellant's shipping instructions was compelled to and did furnish cars by means of which, and in which, the coal was delivered under said contract to the appellant, and in this respect appellant was at all times in default under said contract and guilty of repeated breaches thereof, and a continuing breach. (R. 4.)

The petition alleges that except (14) for the letters of March 7 and March 9, 1921, appellee received no letter nor oral or written notice cancelling or attempting to cancel, or

giving notice of an intention to cancel said contract as of either of the dates mentioned, or as of any other date prior or subsequent thereto, and that said letters dated March 7 and March 9, 1921, were of no legal effect except as they evinced an intention to repudiate the contract, and amounted to such repudiation, etc. (R. 4-5.)

The petition (18) sets up the Uniform Sales Act of Illinois, and claims that the damages fixed by that statute and by the fixed rule established by the decisions of the Illinois court of last resort, are the legal and proper measure of damages. (R. 5.)

(Note: The Illinois Uniform Sales Act was admitted in evidence in the Court of Claims without objection, but is not included in the findings of fact.)

The petition concludes with a prayer for judgment for $460,043.67 "and such further and other relief to which it may appear petitioner is entitled."

After the demurrer to appellee's second amended petition was everruled October 17, 1922, the case was argued and submitted on the merits February 12, 1924. (R. 21.)

Summary of argument.

Appellee argues that its letter of August 6, 1920, to Lieut. Barr (R. 23-24) and his letter of acceptance of August 24, 1920 (R. 24) to appellee, constituted a contract in writing, under which *all* the coal was to be delivered *on or before February* 15, 1920 and that the parties so construed the letters, because without waiting for a subsequent formal contract, appellee shipped and appellant ordered and accepted coal. (R. 24, 30.)

The formal written contract of September 10, 1920 does not in express language state the period of time during which shipments of coal are to be made, or the date of expira-

tion of the contract. It is therefore proper to construe it in connection with the letters of August 6 and August 24, 1920, Lieutenant Barr's letter of September 27, 1920 (R. 24), in which said contract was sent to appellee for signature, and the other correspondence and the acts of the parties and the surrounding circumstances.

Appellee and no one else agreed to sell appellant an entire "total quantity" of coal. The exact tonnage *specified* was 150,000 tons without any qualification (R. 25). Appellant promised *to pay appellee and no one else* a total price of $1, 012,500.00 (R. 25, 6).

Appellee furnished a bond of $105,000 which was required and accepted by appellant. It was signed *only by appellee* as *principal,* and a surety. It ran to the appellant as obligee. (R. 25, 27, 17.)

The tonnage to be delivered at each of the three mines designated in the correspondence and contract was expressly, certainly and exactly specified *without words of qualification* (except that the right to shift the tonnage was reserved in appellee's letter of August 6, 1920.) Appellee and appellant were the *only* parties to the contract. (R. 19, 17, 23-25.)

Appellee's proposition of August 6, 1920 (R. 23-24), which was accepted by appellant's letter of August 24, 1920 (R. 24) expressly states that deliveries of coal shall "be made in substantially equal weekly quantities from *August* 15, 1920 *to February* 15, 1921." *The duration of this contract and the date of its expiration is certain.*

"Schedule A" attached to the formal contract (R. 25, 19) expressly states "contract date September 10, 1920."

(Note: An examination of the language and terms of the concluding parts of the formal contract of September 10, 1920 (R. 17-19) makes it apparent that a printed form was used for making the agreement.)

The formal contract recites (after the blanks were filled in). "These articles of agreement entered into as of the *tenth day of September*, 1920." (R. 6.) But neither this contract nor "Schedule A" attached thereto (R. 25-29) fix the period of duration of the contract or the date of its expiration. This then must be ascertained by computation from the express language found within the contract itself, or by construing it in the light of the negotiations, correspondence and surrounding circumstances mentioned herein, as authorized by the decisions. (*Interior Linseed Co.* v. *Becker-Moore P. Co.*, 273 Mo. 433, 438; *Montgomery Enterprise* v. *Empire T. Co.* (Ala. 1920), 86 So. 880, 885; *United States* v. *Bethlehem Steel Co.* 205 U. S. 106, 117; *Kirby* v. *United States*, 273 Fed. 391, 394; *Sanborn* v. *United States*, 46 Ct. Cl. 254; *Gould* v. *Converse* (Mass. 1923) 140 N. E. 785; *Sanford Ross, Inc.* v. *United States*, 50 Ct. Cl. 168, 174; *Harten* v. *Loeffler*, 212 U. S. 397, 404; *O'Donnell* v. *Daily News Co.*, 119 Minn. 378, 384; *Smith* v. *Ferguson*, 221 Pac. 447, 451.)

Lieutenant Barr, to whom appellee's letter of August 6, 1920, was addressed, signed the acceptance thereof of August 24, 1920, the formal contract of September 10, 1920, and also the letter to appellee of September 27, 1920, in which the formal contract was transmitted to appellee for signature.

In his letter of September 27, 1920, he says "Enclosed is contract for 150,000 tons coal, to be shipped in *approximately five months.*"

Under the decisions "five months" mean "five calendar months," so that under this language contract was to expire on February 10, 1921, instead of February 15, 1921, as provided by appellee's letter of August 6, 1920 (and by appellant's acceptance of August 24, 1920). To make appellant's cancellation letters of any value they had to be signed during the life of the contract but they were dated March 9, 1921 and unless delivered by personal messenger on that date,

presumably were received by appellee March 10, 1921, which was "exactly" and "approximately" one month after February 10, 1921, which last mentioned date was approximately and exactly five calendar months after September 10, 1920, the date of the formal contract.

The authorities are clear that no stretch of language or construction will permit the words "approximately 5 months" to be distorted into "approximately 6 months." The use of the word approximately in connection with a given unit or number of units, cannot increase the specified unit or units by an entire unit. (*Interior Linseed Co.* v. *Becker-Moore P. Co.*, 273 Mo. 423, 438.)

"Schedule A" (R. 25, 19) gives a schedule of deliveries per week of "approximately 1600 tons from White Ash; 2000 tons from Paradise; 2500 tons from Freeman." Inasmuch as the total quantity of coal is specified at 150,000 tons, and definite quantities of coal are named for (approximately) weekly delivery, the date of the expiration of the contract is ascertainable (approximately) from the language used in "Schedule A" itself, without reference to outside correspondence or circumstances. In "Schedule A" the word "approximately" is used in connection with the word "week" and not "month." Every week contains seven days. Taking the total quantity of 150,000 tons of coal and the schedule of weekly deliveries, we find the exact date of expiration is March 1, 1921, which is eight days prior to the date of appellant's letters of cancellation. Appellant must employ the word "approximately" in its connection with the word "weekly," to stretch March 1, 1921, as the date of expiration of the contract, until March 9 or March 10, 1921, by adding to March 1, 1921 more than an entire unit (week) of seven days.

As the case stands, then, on February 9, 1921, appellee wrote appellant it was waiting shipping instructions for unshipped coal, and on the same date appellant wrote request-

ing appellee to stop all shipments until further notice. (R. 31.) From that time nothing occurred until March 9, 1921, when appellant wrote appellee peremptorily cancelling the contract. (R. 32.)

If, as contended by appellant, all the clauses of the printed form used for the contract of September 10, 1920, were intended to apply, it finds itself in this position:

1. The contract under the letters of August 6 and August 24, 1920, expired February 15, 1921. (R. 23-24.)

2. Or, under Lieut. Barr's letter of September 27, 1920, enclosing the contract of September 10, 1920, and stating the coal was to be shipped in "approximately five months," it expired about February 10, 1921. (R. 24.)

3. Or, by computing the amounts of the weekly shipments and ignoring these letters, it expired March 1, 1921, approximately.

4. Both parties concede Schedule "A" to be in full force and effect and it makes time the essence of the contract. (R. 25-26, 19.)

5. The printed form expressly provided (Art. 22) that no provision of the contract should be deemed *waived without express consent in writing signed by the party to be charged with the waiver.* Appellee signed no such written consent. So the rights of appellant under the contract, whichever one of the above dates to be taken as the date of expiration, was not and could not have been extended. (R. 29, 17.)

6. The contract of September 10, 1920, having expired by lapse of time, the reserved power of termination and all its dependent clauses limiting damage was extinct, and appellee's rights became fixed. *Gibbons* v. *United States,* 8 Wall 269, 273; *Riddle Co.* v. *Taubel* (Pa. 1923) 120 Atl. 776; *Quercan* v. *Computing Scale Co.,* 148 App. Div. 860; *Bour* v. *Kimball,* 46 Ill. App. 327, 329; *Downey* v. *Shipston,* 200 N. Y. S. 479, 482; 206 App. Div. 55,

7. Indulging the assumption, that by some legal legerdermain the contract was kept alive until March 9, 1921, yet its attempted termination on that date was wholly without efficacy because:

(*a*) The letter of March 9, 1921, stated that the coal would not be taken and that the appropriation was exhausted, but the facts show it was not exhausted, but it was desired to divert it to other purposes. (R. 38-39.)

(*b*) The appropriation not being exhausted, the remaining part of the letter was a flat refusal to take the coal amounting to an abandonment and repudiation of the contract.

(*c*) Appellee being without directions as to the quantities of coal required by appellant, the destination points, and in the case of one mine, the preferred carrier, could not move. (R. 33.)

(*d*) The contract is not made dependent upon and subject to any special appropriation. Insolvency, a lack or shortage of funds, or the exhaustion of a general appropriation, is no legal excuse to terminate a contract. No one may terminate a contract for his own default.

(*e*) A statement that no more coal will be ordered under the contract means that no more shipping directions will be given, cars furnished, or more coal received or paid for. An examination of the contract shows it means nothing else.

(*f*) Appellant had no right to summarily cancel the contract orally or in writing under Section 1 of Paragraph 9 thereof, or under general principles of law inasmuch as the appellee was not in default and never had been.

(*g*) The letters are not in form or substance "notices" of anything at all. Whether taken together or singly they are not notices of termination of the contract under Section 2 of Paragraph 9 thereof. They do not refer to that section or paragraph, or use the word "terminate," but the word "cancel." The word "notice" is not employed. No date of termination is given. (R. 32.)

(*h*) If intended as notices of the termination of the contract under Section 2, they are wholly insufficient and nugatory. No reference is made to "public inter-

est" or a termination in that interest, or to a consideration of the question by the Quartermaster General or his opinion thereon. They do not place the day of termination of the contract fifteen or more days in advance of the letters, but assume to cancel the contract "hereby." (R. 32.)

(*i*) They refer to no disagreements, matters in controversy, or disputes on which the Secretary of War could act under "Schedule A," nor to any reference to, or decision, by him concerning the same, nor even mention it. The letters ask nothing—they object to nothing. (R. 26, 29, 20, 15.)

(*j*) They do not refer to the withdrawal of any garrison or troops, or radical change in the service, or state that by reason thereof or for any other reason the coal mentioned in the contract was not required. They do not ask for any modification of the contract whatsoever whether "accordingly" or otherwise. ("Schedule A" is not mentioned. (R. 26, 20.)

(*k*) A party to a contract who is first in default and continues in default, cannot rescind it. The appellant was first in default, and always in default.

(*l*) Contract was dated September 10, 1920. If the letters be treated as proper notices of the termination of the contract, they were not written within a reasonable time under the circumstances of this case.

(*m*) The acts and letters of the appellant prior to March 1, 1921, constituted a waiver of the right to terminate the contract, and constitute the basis of estoppel to exercise the right against appellee.

(*n*) By "Schedule A" all the provisions of the contract are made dependent on the appellant furnishing cars. This, appellant did not do, but was at all times in default. It could not then terminate the contract under Sections 1 and 2 of Paragraph 9 of the contract, or under general principles of law. Furthermore the contract had expired by limitation of time and there was nothing to terminate. The power of termination died with the contract, leaving the parties with their rights and obligations as they existed when it expired. (R. 33.)

(*o*) If the time for delivery and corresponding payment can be said to have been extended indefinitely by any act or conduct of the parties, nothing else was ex-

tended and the termination was not only unreasonably late but an arbitrary and unreasonable termination, and an act of the grossest bad faith which cannot be upheld.

(*p*) The letters amounted in law not only to a mere breach of contract, but, being absolute refusals to perform, they constituted a repudiation. A repudiation in the eyes of the law is regarded as a prevention of performance.

(*q*) The letter actually prevented performance, for without shipping directions appellee could not act. A repudiation of a contract by any one party absolves the other from duty of performance, and gives him his right to sue for damages at his option. (R. 33, Findings XI and XII.)

The shipment of coal began immediately. (R. 30.) That all the coal was to be taken on or before *February* 10 *or* 15, 1921, seems to have been in the mind of Lieut. Barr as late as *September* 27, 1920 (R. 24). Both the parties to the contract seem to have understood this was the agreement as late as February 9, 1921, which was one or six days before it was to expire, depending on whether February 10 or 15, 1921 be the expiration date. Both parties wrote their letters on that date. (R. 31.) In view of the contract what is the situation of appellant? It was optional with appellee after receiving the letter of February 9, 1921, from appellant, if it was a repudiation, to immediately sue for its breach, or treating it as a mere suspension, to wait a reasonable time for shipping instructions. Appellant had not positively refused to take the coal and had been expressing "hopes" of finding storage space for it. (R. 31.)

Appellee was not in default and could not be prejudiced by extending indulgence. It had no shipping instructions. Upon this state of facts the law would appear to be:

1. If appellant had insisted on an extension of time to order out the coal, appellee could have sued although the contract had not yet expired.

2. Appellant, however "requested" suspension of deliveries until further notice but did not state it would repudiate the contract unless the extension was granted. This was not a repudiation. (R. 31.) *Mattison M. W.* v. *Nypenn F. Co.*, 286 Pa. 501, 134 A, 459; *James R. L. Co.* v. *Smith* (Va. 1923), 116 S. E. 241, 244; *Kerlin-Patterson L. Co.* v. *Eufaula H. Co.*, (Ala. 1924) 101 So. 623.

3. Appellee remained silent which was neither a waiver or its rights nor a consent to an extension of time for ordering out the coal. (R. 29, 17.)

4. Appellee's failure to sue for the previous suspensions of deliveries by appellant was not a waiver of any of its rights.

5. Appellee was entitled to a reasonable time after February 15, 1921, to complete its delivery, but was prevented from so doing by appellant's failure to give shipping instructions and the unqualified repudiation of the contract on March 9, 1921. *Belden, et al.* v. *Woodmansee*, 81 Ill. 25.

The United States has no inherent right to cancel a contract with a private citizen, and cannot without the ordinary contractor's liability suspend a contract from motives of public consideration. (*Gillespie* v. *United States*, 47 Ct. Cl. 167, 171; *McIlraith, etc.* v. *United States*, 46 Ct. Cl. 377, 391; *Houston Const. Co.* v. *United States*, 38 Ct. Cl. 724.) The words "public interest" do not relate to matters in which the nation may have a private or proprietary or specific interest, such as a contract or litigation to which it may be a party. See *Wolff P. Co.* v. *Court, etc.*, 262 U. S. 522, 537.

The appellant on the argument of its demurrer to the second amended petition, which was overruled by the Court of Claims, without prejudice, attacked the jurisdiction of the Court of Claims. Appellee insisted the Court of Claims had jurisdiction of the instant case for the reasons hereinbefore enumerated under the Judicial Code pertaining to the Court of Claims (36 Stat. L. 1135). Section 145 provides that "The Court of Claims shall have jurisdiction to hear and determine all claims (except pensions) * * * founded upon any contract,

express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in respect of which claims the party would be entitled to redress against the United States if the United States were suable."

(*a*) Appellant by its several requests in writing prior to the first day of March, 1921, for delay in the time stipulated in the contract for the deliveries of coal, waived the right of forfeiture or termination fixed by Section 2 of Article 9 of the contract, and therefore also the clauses relating to arbitration and stipulated damages which were part of said Section 2, and wholly dependent on a termination of the contract thereunder. These clauses cannot stand alone if the termination clause was waived.

(*b*) This waiver also applies to the provisions of Article 17 of the printed contract, and of Section 15 of Schedule "A" to the effect that claims, doubts, disputes and disagreements as to the performance of the contract are to be determined by the Secretary of War whose decision shall be final.

(*c*) The determination of the contract by time extinguished these clauses with the rest of the contract.

(*d*) The letters of March 7 and March 9, 1921, from appellants, absolutely and unequivocally refused to go on with the contract. There were no claims, disputes, disagreements or matters in controversy, so the provisions in Article 17 and Schedule "A" for a determination by the Secretary of War of such differences do not apply.

(*e*) This prevention of performance or repudiation also operated as a waiver of the stipulated damages, the arbitration provisions, and the right of forfeiture or determination reserved in the contract.

(*f*) The clauses for stipulated or liquidated damages are to be construed as provisions for penalties and therefore the actual damages may be recovered. If the Government asserts the contrary it has the burden to establish it.

(*g*) Under Paragraphs *a*, *b*, *c* and *d* of Section 2 of Article 9 of the printed contract here sued on (R. 10-11), it is provided that if the United States terminate the contract in the public interest it will repay the contractor (*b*) the proportion of his expenditures fairly apportionable to the delivery of the articles which is terminated plus ten per cent and protect him against the same proportion of the obligations (*c*) he has incurred, the facts to be determined by agreement.

The Government also (*d*) is to pay on account of depreciation of plant facilities and equipment solely provided by the contractor, at its expense for the performance of the contract an amount to be determined by appraisal of the plant, &c., and no other payments. Article 8 provides that in the event of delay in performance by the contractor without his fault, the Government may refuse delayed delivery and pay as stipulated in the above paragraphs. The evidence is undisputed that the appellee owned none of the mines named in the contract or any coal mine or plant but was a selling corporation, and that appellant knew it, and that no coal was mined until the cars were on the track to be loaded. The parties could not have intended the above paragraphs from this printed form should be part of their contract, but if they did then they should be construed as providing for a penalty because the damages stipulated would be wholly disproportionate and inadequate to those actually sustained by appellee.

(*h*) If these paragraphs for stipulated damages are to be treated as part of the contract, and inserted for the benefit of appellee, it may waive them, but if inserted for the benefit of appellant it may not urge them having repudiated the contract and having always been in default.

(*i*) If the appellee had brought this suit at any time up to March 9, 1921, for appellant's failure to furnish cars, give shipping instructions, or receive the coal remaining undelivered, it could have recovered the damages actually sustained.

The appellant in default cannot take advantage of its wrong under the guise of a clause stipulating damages.

(*j*) In the event of the termination of the contract under the right reserved in Section 2 of Article 9 it is provided in Paragraphs (*c*) and (*d*) of said section that if the contractor and Government contracting officer cannot agree (*c*) upon the facts upon which part of the damages are to be based and (*d*) upon the fair market value of the contractor's plant, facilities and equipment, then in both cases each shall select a representative and the two persons so chosen shall select a third. These three persons so selected are to determine the necessary facts and values in each case. The appellant having terminated the contract for no fault of the appellee if it cared to rely on the above provisions, should have taken the initiative and named a representative, and notified appellee of such action. It neither did this nor did anything pursuant to said Paragraphs (*c*) and (*d*), nor did the appellant refer to or take any steps to refer any "matter in controversy" to the Secretary of War under Section 15 of "Schedule A" of the contract.

Whether or not there should be a reference to the Secretary of War under Article 17 of the printed contract relating to claims and disputes was optional with appellee and it did not exercise this option. (R. 15.)

(*k*) Section 2 of Article 9 of the printed contract providing for arbitration, appraisal and stipulated damages by its terms applies upon "termination of this contract *prior to completion* as provided in this Section 2 *for any reason* other than the default of the contractor." It should be construed as providing for a penalty because: (1) it is an independent agreement collateral to the principal contract; (2) it relates to breaches of several clauses of varying importance; (3) the actual damages are readily ascertainable.

(*l*) Section 2 provides for the arbitration of matters of future disagreement and was therefore not binding or irrev-

ocable so long as it remained executory and had not been carried through to an award or decision. The section is no defense to this action.

(*m*) Section 2 does not by its terms provide that no action shall be maintained on the contract of which it is a part until after an award. This section is therefore collateral and independent and a breach of it cannot be pleaded in bar to the principal contract. Even if it did so provide it could be and was waived.

(*n*) Under Section 2 either party could have demanded arbitration or could waive it. A party who makes no such demand must be presumed to have waived it. In the present case neither party made a demand so both waived arbitration.

(*o*) Said Section 2 also provides upon payment by the government of the damages ascertained by the arbitrators under its stipulations "any and all obligations of the United States to make any payments other than those specified or provided for in this Section 2 * * * shall at once cease and determine."

If the purpose of Section 2 was to submit all controversies, disputes and differences relating to the performance of the contract to the final decision of the tribunal constituted by the parties under this section and other sections, and to oust the courts of jurisdiction said section is illegal and void.

The Atlanten, 252 U. S. 313, 316.

Watts v. *Connors*, 115 U. S. 353, 360.

United States v. *United Engineering Co.*, 234 U. S. 236, 243.

Mosler Safe Co. v. *Maiden Lane S. D. Co.*, 199 N. Y. 479, 487, 488.

Jaquith v. *Hudson*, 5 Mich. 123, 133.

Mt. Airy M. etc., Co. v. *Runkles*, 118 Md. 371, 376, 378; 57 L. R. A. (n. s.) 373 and note p. 381.

Seidlitz v. *Auerbach*, 230 N. Y. 167, 173.

Taylor v. *Sandiford*, 7 Wheat. 13, 15.

Independent School Dist. v. *Dudley,* (Ia. 1923) 192 N. W. 261.
United States v. *Montell,* 47 Fed. Cas. 15,798.
Garfield, etc., Coal Co. v. *Penn. Coal, etc., Co.,* 199 Mass. 22, 40.
First Eccl. Society v. *Besse,* (Conn. 1923) 119 A. 903, 905.
Cocalis v. *Nazlides,* 308 Ill. 152, 156, 158.
Norton v. *Gale,* 95 Ill. 533.

While under the evidence in this case it is not a vital matter whether the damages be fixed as of February 10 or 15 or March 1, or March 9, 1921, damages should probably be fixed as of the date of final delivery whether it be February 10 or 15 or March 1, 1921 but under many decisions March 9, 1921, the date of repudiation should be taken.

Where one party to a contract makes repeated promises to perform it during a considerable period and gives no notice of an intention to repudiate it until a definite date, the latter date should be taken as the date of the breach for fixing damages. (*Petoskey P. C. Co.* v. *Benjamin Co.,* 296 F. 9, 11; *Hess Bros.* v. *Great Northern P. Co.* (Wis. 1921) 185 N. W. 542.

ARGUMENT.

I.

Did appellant lawfully cancel or did it breach or repudiate its contract and prevent its performance by appellee?

1.

THE RULES GOVERNING THE UNITED STATES AS A CONTRACTOR.

Where the government enters into a contract with a private individual or corporation, it divests itself of its sovereign character in reference to the particular transaction and is as much bound thereby as an individual. It has no immunity from the performance of its obligation and in a suit against it in its proprietary capacity it is governed by the same legal and equitable principles as private litigants. (*United States* v. *Stinson,* 197 U. S. 200, 204, 205; *Purcell Envelope Co.* v. *United States,* 51 Ct. Cl. 211, 215, 218; 249 U. S. 313, 317, 320; 47 Ct. Cl. 1, 18, 23-24; *Williams* v. *United States,* 26 Ct. Cl. 132, 141; *Pigeon* v. *United States,* 27 Ct. Cl., 167, 175; *Cook, et al.* v. *United States,* 91 U. S. 389, 396, 398, 401; *Garfielde* v. *United States,* 93 U. S. 242, 246; *United States* v. *Speed,* 8 Wall. 77, 83.)

The rule that a contract is to be construed most strongly against the party who prepared it applies to the United States in respect to its contracts with private parties. (*United States* v. *O'Brien,* 220 U. S. 321, 327; *United States* v. *Newport N. S. & D. D. Co.,* 178 Fed. 194, 200; *Stone & Gravel Co.* v. *United States,* 234 U. S. 270, 278, 289; *Scully* v. *United*

States, 197 Fed. 327, 343; *United States* v. *Bentley, etc. Co.,* 293F, 229, 235.

In contracts between a private citizen and the United States, the same definitions, rules and interpretations and construction which govern ordinary contracts will be applied. (*Moore* v. *United States,* 196 U. S. 157, 168; *United States* v. *Pine River L. & I. Co.,* 89 F. 907; 186 U. S. 279, 289, 291. *Brawley* v. *United States,* 96 U. S. 168, 172; *Smoot* v. *United States,* 237 U. S. 38, 42; *United States* v. *Buffalo-Pitts Co.,* 234 U. S. 228, 234, 235; 193 F. 905. *United States* v. *North Am. Co.,* 253 U. S. 330, 333; *United States* v. *Andrews,* 191 U. S. 159, 163; *Carnegie Steel Co.* v. *United States,* 240 U. S. 156, 165.)

It follows that in a contract between the United States and a citizen, the Government contracts with reference to the laws in force in the jurisdiction where the contract is made. (*United States* v. *Ansonia Brass Co.,* 218 U. S. 452, 474; (Affirming in part *Hawes & Co.* v. *Trigg Co.,* 110 Va. 165; 65 S. E. 538, 548, 553, 556.) *United States* v. *Garland,* 271 F. 14; *Illinois Surety Co.* v. *John Davis Co.,* 244 U. S. 376, 381. *United States* v. *U. S. Fidelity Co.,* 236 U. S. 512, 530. *Northwestern Terra C. Co.* v. *Caldwell,* 234 F. 491, 496, 504.)

The United States is liable for damages resulting from improper interference with the work of a contractor. (*Hyde* v. *United States,* 38 Ct. Cl. 649; *Houston C. Co.* v. *United States,* 38 *id.* 724; *Ketcham* v. *United States,* 40 *id.* 220; *United States* v. *Spearin,* 248 U. S. 132, 138; *United States* v. *Purcell Env. Co., supra; United States* v. *Smith,* 94 U. S. 214, 217.)

Interference by the United States with the performance of a contract excludes it from exercising its reserved right to annul the contract. (*King* v. *United States,* 37 Ct. Cl. 428; *Savage Const. Co.* v. *United States,* 47 Ct. Cl. 298, 306, 308;

Gillespie v. *United States,* 47 *id.* 167, 171; *Stone & Gravel Co.* v. *United States,* 234 U. S. 270, 277, 279; *Ripley* v. *United States,* 223 U. S. 695, 701; *United States* v. *Barlow,* 184 U. S. 123, 133, 137; *Ittner* v. *United States,* 43 Ct. Cl. 336, 350.)

Reservation in a contract of the right of one party to terminate it upon a particular ground, cannot justify its breach on the ground that other causes existed which might have justified the termination of the contract when the party (Government) terminated it upon the particular ground (*Purcell Envelope Co.* v. *United States,* 47 Ct. Cl., 1, 18, 23; 51 *id.* 211, 215, 218; 249 U. S. 313.)

The United States by its letters of December 6, 1920, January 12 and February 9, 1921, waived the time limit for the delivery of coal. (R. 30-31.)

The waiver of a time limit fixed in a contract is a waiver of the right of forfeiture. (*Rosser, et al.* v. *United States,* 46 Ct. Cl. 192, 196; *Savage Const. Co.* v. *United States,* 47 Ct. Cl. 298, 306, 308; *American Dredging Co.* v. *United States,* 49 Ct. Cl. 350, 359; *Wyant* v. *United States;* 46 Ct. Cl. 205; *Gleason* v. *United States,* 33 Ct. Cl. 65, 86; *Pigeon* v. *United States,* 27 Ct. Cl. 167, 175; *Phillips* v. *Seymour, et al.,* 91 U. S. 646, 652; *Maryland Steel Co.* v. *United States,* 235 U. S. 451, 457; *Louisville & N. R. R. Co.* v. *Mason & Hoge Co.,* 126 Ky. 844, 853; *Andrews* v. *Tucker,* 127 Ala. 602.)

Even in a case where a contract may be rescinded by the Government under a provision in the contract reserving this right, this can only be done by an officer authorized so to do. (*United States* v. *Shaw,* 1 Cliff. 317; 27 Fed. Cases No. 16,266; 39 Cyc. 745 and note 35. *United States* v. *N. American Co.,* 253 U. S. 330, 333; *Pine River L. Co.* v. *United States,* 186 U. S. 279, 289, 291; 89 Fed. 907; *Utah P. & L. Co.* v. *United States,* 243 U. S. 389, 409. *United States* v. *Lee W. Co.,* 214 Fed. 630, 651. *United States* v. *Walsh,* 115 Fed. 697, 701; *Hawkins* v. *United States,* 96 U. S. 689. *Lewman* v. *United*

States, 41 Ct. Cl. 470, 475; *Mitchell* v. *United States,* 19 Ct. Cl. 39; *Worthington* v. *Dist. of Columbia,* 19 Ct. Cl. 123; *Brainard* v. *Dist. of Columbia,* 19 Ct. Cl. 128.)

Where the Government by its own fault has prevented the performance of the contract within the prescribed time, it waives a stipulation therein as to liquidated damages, and such is the case even if the subsequent delay is the fault of the other party. (*Maryland Steel Co.* v. *United States,* 235 U. S. 451, 456, 460. *United States* v. *United Engineering Co.,* 234 U. S. 236, 243. *Ittner* v. *United States,* 43 Ct. Cl. 336, 350. *Garfielde, etc. Coal Co.* v. *Penn. Coal etc. Co.,* 199 Mass. 22, 40. Corpus Juris, Vol. 17, Sec. 265, p. 965. *Strobel S. C. Co.* v. *Sanitary Dist.,* 160 Ill. App. 554, 560.)

An arbitration clause in a contract for final settlement of any dispute has no application where there was not merely a dispute in carrying on the contract but a substantial repudiation of it by one of the parties. (*The Atlanten,* 252 U. S. 313, 316. *United States* v. *McMullen.* 222 U. S. 460, 471.)

2.

THE CONTRACT AND ITS CONSTRUCTION GENERALLY.

The contract of September 10, 1920, is a single indivisible contract for the sale of a definite gross quantity of a commodity at a specified gross price, to be loaded and delivered in equal weekly installments of approximately the same quantities (subject to immaterial variations) at the three specified mines (subject to a shifting of tonnage), free on board cars, to the purchaser who is to make payments in corresponding installments at a specified price per ton. The duration of the contract and the date of its expiration are details which while not stated in express terms, are ascertainable by mere mathematical computations from the express provisions. Under the express terms of the contract its perform-

ance required the buyer to take the initiative in two respects which were conditions precedent to performance by the seller.

(*a*) The giving of shipping directions as to the exact times, points of destination, quantities and medium of transportation of shipments.

(*b*) The furnishing of cars in sufficient number at the various specified mines to receive the coal at the times and in the quantities designated in the shipping directions. Until compliance by the buyer with these conditions the seller could not be and was not required to do anything, and could not be in default in carrying out the contract. Buyer was bound to take gross quantity of coal specified in the contract before the time of its expiration.

It is evident that many provisions and clauses of the printed form, used in this instance, have no relation to the subject matter of this particular contract, and could not be said to have any application. In such case it could not have been the intention of the parties that such provisions and clauses should become a part of the contract.

A contract for the sale of a definite quantity of a commodity at a fixed gross price, although providing for deliveries and payments in installments of specified quantities and amounts at specified times, will be construed by the Court as one single contract and the installment features treated as fixing a method or guide of performance, unless the intentions of the parties clearly appear to the contrary. (*Norrington* v. *Wright,* 115 U. S. 188, 203, 206, 212. *Bucki & Son L. Co.* v. *Atlantic L. Co.,* 109 F. 411; *Dimmick* v. *Banning C. & Co.,* 256 Pa. 295, 300-301; *Rocky Mountain F. Co.* v. *Consolidated C. & C. Co.,* 276 F. 661, 667; *Jung Brewing Co.* v. *Konrad,* 137 Wis. 107, 116; *Petersburg F. B. & T. Co.* v. *Am. C. M. Co.,* 89 O. St. 365, 372; *Christy* v. *Stafford,* 22 Ill. App. 430, 433 (Judg't Aff'd. 123 Ill. 463); *Mangold S. & C. Co.* v. *L. E. Moore S. Co.,* 197 F. 20, 29; *Loudenback F. Co.* v.

Tenn. P. Co., 121 F. 298; *Laclede C. Co.* v. *Tudor I. W.*, 169 Mo. 137; *Bacon* v. *Cobb*, 45 Ill. 47, 56; *Bamberger Bros* v. *Burrows*, 145 Ia. 441, 451; *Am. Fuel Co.* v. *Interstate F. Agcy.*, 260 F. 120, 124.)

Before proceeding further with the question of the construction of the contract between the parties, it might be well to observe that the parties made three contracts each of which standing alone would ordinarily be complete, definite and capable of enforcement by either party.

(*a*) "On August 5, 1920, an oral understanding was arrived at between plaintiff's said officers and Colonel Barney and Lieutenant Barr as to certain terms for the furnishing of 150,000 tons of coal" by appellee.

(*b*) "Pursuant to a request of said Government officers for a confirmation by plaintiff of said understanding appellee on the following day, *August 6th*, wrote Lieutenant Barr" saying: "Confirming conversation of the 5th inst., we offer to enter into a contract with the War Department * * * to supply for shipment * * * 150,000 tons" of coal. (R. 23.)

August 24, 1920, Lieutenant Barr wrote appellee referring to the last mentioned letter of August 6, 1920, and said that the "proposition has been accepted."

Lieutenant Barr in this letter, however, also stated that a contract was being drawn up and would be furnished for signature within a few days. (R. 24.) So it appears that a formal or third contract was still in the minds of the parties. The contract consisting of the letters of August 6 and August 24, 1920, between the parties, although a more formal contract was contemplated, was a valid contract. (*United States* v. *Anderson*, 207 U. S. 229, 243; *Am. Smelting Co.* v. *United States*, 259 U. S. 75, 78; *Am. S. & R. Co.* v. *United States* 42 Sup. Ct. Rep. 420, 421; *Bowman* v. *Lecatato*, 202 F. 73, 77; *McIlraith, etc. Co.* v. *United States*, 46 Ct. Cl. 377, 391; *Everett* v. *Emmons C. M. Co.*, 289 F. 686, 690; *N. Jacobi H. Co.* v. *Vietor*, 11 F. (2d) 30, 32.)

In *Sanford Ross, Inc.* v. *U. S.*, 50 Ct. Cl., 168, 173, the Court said:

> "The claimant's *proposals* to do the work *were based upon the specifications, and the agreement between the parties, when the bid was accepted, was to be reduced to writing.* The intention of the parties was by their contract to reduce to writing the *agreement at which they had arrived, by the bid* and *its acceptance,* and was not to make a *materially different* agreement. They, therefore, *carried into* the written contract by reference, the terms of the specifications as to the quantities of excavated materials, and the transportation and dumping of such materials." Citing *Moore's case,* 196 U. S. 157. (See also *Mueller* v. *U. S.* 19 Ct. Cl. 581, 590.)

In *Harvey* v. *United States*, 105 U. S. 571, 688, 689, it was said:

> "The written *bid* in connection with the advertisement and the *acceptance* of that bid, *constituted* the *contract* between the parties. * * * *Garfielde* v. *United States,* 93 U. S. 242; *Equitable Insurance Co.* v. *Hearne,* 20 Wall. 494. The *written* contract in that respect was *intended* by both parties to be *merely* a *reduction* to *form* of the statement as to work and prices contained in the bid. If the *formal* contract is susceptible of a different construction, to the prejudice of the contractor, it is very plain that *not only* the contractors *but the officers* of the Government were under a mistake." (See also *Nielson & K. C. Co.* v. *Lowe & Co.* (Tenn. 1924), 260 S. W. 142, 143.)

There can, of course, be no doubt that these letters of the parties of August 6, and August 24, 1920 (R. 23-24), as well as the letter from Lieut. Barr of September 27, 1920, enclosing to appellee the contract of September 10, 1920 (R. 24) may be resorted to to throw light upon any ambiguities found in the contract of September 10, 1920.

United States v. *Bethlehem Steel Co.*, 205 U. S. 105, 117, was an appeal from the Court of Claims. The Court said (p. 118):

> "We think that much light is given as to the true meaning of language, that is not wholly free from doubt, by consideration of the correspondence between the parties *before the final execution* of the contract itself. Under such circumstances we think it has never been held that recourse could not be had to the *facts surrounding the case*, and to the *prior negotiations* for the purpose of determining the correct construction of the language of the contract." (Citing: *Simpson* v. *United States*, 199 U. S. 397-399. *Brawley* v. *United States*, 96 U. S. 168, 173.)

In *Kirby* v. *United States*, 273 F. 391, 394, it was said:

> "The intention of the contracting parties is made clear by referring to *the written offer which the defendants submitted preliminary to the contract*, and which may be *properly taken into consideration* in construing the instrument." (See also *Northwestern Terra C. Co.* v. *Caldwell*, 234 F. 491, 499; *Markey* v. *Brumson*, 286 F. 893, 895.)

In *Garfielde, etc. Coal Co.* v. *Penn. Coal, etc., Co.*, 199 Mass. 22, 36, 37, the contract provided in part that coal should be shipped "in *about equal monthly proportions.*" The Court said:

> "The correspondence and negotiations between the parties *before the making of the contract were* indeed competent under the circumstances of the case, as an aid in construing the language in which they finally embodied their contract." (See also *O'Donnell* v. *Daily News Co.*, 119 Minn. 378, 384; *George Finberg Co.* v. *Jamison*, 260 S. W. 884, 886; *Harten* v. *Loeffler*, 212 U. S. 397, 404; *Mo. P. R. Co.* v. *Holt*, 293 F. 155, 162; *Carroll* v. *Drury*, 170 Ill. 571, 577; *Close* v. *Browne*, 230 Ill. 228, 237.)

In *Barrett* v. *Book C. R. Co.* (Colo.), 201 Pac. 1026, it was held:

It is not important, that all the terms of a contract, be set out in one instrument and where from the correspondence the intent of the parties to contract for a sale, may be clearly inferred, it is sufficient.

See also: *Trusler G. Co.* v. *Earlton G. C. A.* (Kas.) 199 Pac. 964; *W. R. Grace & Co.* v. *Nagle,* 275 F. 343, 345.

In the present case Lieut. Barr in his letter to appellee of *September* 27, 1920, *before appellee had executed* the contract of *September* 10, 1920, *enclosed therewith,* for the execution by appellee, made the positive representation that the contract was to be performed, *within approximately five months.* This was in substantial accord with the letter of August 6, 1920, fixing the *date of expiration* of performance on *February* 15, 1921, and appellee signed the contract.

A letter written by one of the parties to the other, and attached to their written contract before it is executed, must be regarded as a modification of the formal terms of the contract or as indicating how they shall be construed. (*Sanborn* v. *United States,* 46 Ct. Cl. 254.)

Where a contract in writing consists of two or more instruments executed at different times, the same should be considered together by the Court in arriving at the intent of the parties. (*Smith* v. *Ferguson,* 221 P. 447, 451; *Montgomery Enterprises* v. *Empire T. Co.* (Ala. 1920), 86 So. 880, 885.

Where appellant wrote appellee a letter, stating his understanding of an agreement, theretofore reached between them, he was bound by his own written statement, and it must be taken to constitute the agreement when relied on by plaintiff. (*Gould* v. *Converse,* (Mass. 1923), 140 N. E. 785.)

Where a contract of sale contains no stipulation as to time, evidence of a promise to deliver or receive goods within a specified time is admissible. (*Elliott* v. *Howison,* 146 Ala. 568.)

> "The vital principle of equitable estoppel is that he, who by his language or conduct, leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectation upon which he acted. Such a change of position is sternly forbidden. * * * This remedy is always so applied as to promote the ends of justice." Quoting *Dickerson* v. *Colgrove,* 100 U. S. 578, 580. 21 C. J. 1114 was also quoted. *Monte Vista F. C. P. Co.* v. *Bemis B. B. Co.,* 294 F. 8, 13.)

Wells v. *Carpenter,* 65 Ill. 447, 450, holds:

> "The true principle of sound ethics is, to give a contract the sense in which the person making the promise believed the other party to have accepted it, if he in fact did so understand and accept it."

A party to a contract will be held to that construction which he knew the other party to it supposed it to bear. (*Fritch Hardware Co.* v. *Donovan,* 221 P. 681.)

The moral rule that a contract should be given the sense in which the person making the contract believed the other party to have accepted it, is also the accepted rule of law and equity as well as the law of nations. (*Weinstein* v. *Sheer,* (N. J.) 120 A. 679.)

The fact that the contract which was dated September 10, 1920, was not actually signed until on or after September 27, 1920, cannot have any bearing on the date of the expiration of the contract. (This is the rule laid down in *Scandinavia R. Co.* v. *Macon Jr. Co.,* 258 Pa. 261, 266.)

It expired either February 15th, as fixed by appellee's letter of August 6, 1920, or *approximately* five months after September 10, 1920, as stated in Lieut. Barr's letter of September 27, 1920, which under an Illinois decision would make

the date of expiration *on or before* February 10, 1921. Under some decisions "*approximately* five months" after September 10, 1920 might be February 15, 1921.

Schedule "A" of the formal contract called for a *total weekly delivery* from the three designated mines (R. 25, 19) of "approximately" 6100 tons. If this exact quantity was delivered weekly, the contract expired March 1, 1921. To extend it by construction of the word "approximately" to March 10, 1921, necessitates a variation of something over sixteen per cent, which under the authorities is neither slight nor unimportant and the variation shown by the findings was not accidental but deliberate and intended, and without legal excuse, although the occasion for it may not have been designedly produced.

The date of the expiration of an installment sales contract though not specified, will be computed by taking the amounts of the prescribed weekly shipments as a basis and this will control and fix the time. (*Lang & G. Mfg. Co.* v. *Fort Wayne C. P. Co.*, 278 Fed. 483, 489.)

It was there said (p. 489) "it would require fifty weeks to complete delivery. Given the total yardage and the quantity to deliver weekly, it would be quite superfluous to insert in the contract the time within which delivery was to be completed. It is there as definitely as if it had been specified." In this case there were no other contemporaneous and previous documents to aid construction. (*Garfielde* v. *United States*, 93 U. S. 242, 246; *Purcell Env. Co.* v. *United States*, 51 Ct. Cl. 211, 215, 218; 47 *id.* 1, 18, 23; 249 U. S. 313, 317, 319.)

In *Dimmick* v. *Banning C. & Co.*, 256 Pa. 295, 300, the Court said (p. 300):

> "The contract is an entire one for a quantity of coke between specified maximum and minimum amounts, to be shipped in '*about equal*' monthly installments as specified by the buyers, and to *such places as might be desig-*

nated. Until the buyers indicated the quantity and places of shipment the sellers *could do nothing.* The burden of making the *first move* was, by the express terms of the contract placed on defendants."

And the Court also said (p. 301):

"The provision requiring monthly shipments to be *approximately equal* is an important one in a contract of such magnitude * * * (it) cannot properly be construed *as a limitation or qualification* of the first paragraph of the *contract fixing the quantity the purchaser might elect to take.* It is merely a *guide* for the parties in determining the monthly amounts they must be prepared to accept and deliver."

In the above case the maximum was 120,000 tons, and the minimum 96,000 tons. In the present case there is no option as to the total tonnage, but it is certain and exact.

The word "month" as used in statutes and contracts, means a *calendar* month. The contract states therein that it is made as of September 10, 1920, and *five* months from that date is *February* 10, 1921. (*Bozman* v. *Bozman* (Del. 1922), 118 A. 657; *Molter* v. *Spencer* (Wis. 1920), 180 N. W. 261; *City of Jackson* v. *Mississippi F. I. Co.* (Miss. 1923) 95 So. 843, 845; *Sovereign Camp, etc.* v. *Reed* (Ala. 1922), 94 So. 910, 913; *Salios* v. *Swift* (Ga. App. 1920), 102 S. E. 869, 870; *State* v. *White* (Fla. 1917), 74 So. 486, 487; *Bohles* v. *Prudential Ins. Co.*, 84 N. J. L. 315, 316; *Fairchild, etc. Co.* v. *Southern, etc. Co.*, 158 Cal. 264, 268; *Bank of Union* v. *Baird*, 72 W. Va. 716, 718; *In re* Standard C. Co., 68 Or. 550, 555.)

The word "weekly" appearing in a statute or contract will be construed as meaning a period of seven days. Accepting this definition the contract of September 10, 1920, expired about March 1, 1921. (*Bauchier* v. *Hammer*, 140 Wis. 648; *United States* v. *So. Pac. Co.*, 209 Fed. 562, 567; *Oberhaus* v. *State*, 173 Ala. 483, 497; *Myakka Co.* v. *Edwards*, 68 Fla. 372; *State* v. *Johnson Co. Ct.*, 138 Mo. App. 427; *Michel* v. *Taylor*, 143 *id.* 683; *Williams* v. *Ettelson*, 178 Mo. App. 178.)

3.

THE MEANING OF THE WORD "APPROXIMATELY."

The word *"approximately"* used in connection with the words *"five months,"* in the letter of September 27, 1920, in which Lieutenant Barr transmitted the contract of September 10, 1920, to appellee, certainly *cannnot increase* the total number of units by a *whole unit. Five calendar months* from September 10, 1920, is February 10, 1921. Approximately *five* months from September 10, 1920, cannot mean *six months from September* 10, 1920, *or March* 10, 1921. (*Interior Linseed Co.* v. *Becker-Moore P. Co.*, 273 Mo. 433, 447.)

Unless the cancellation letter of March 9, 1921, was delivered by personal messenger to appellee, it was not received until March 10, 1921. See *Oldfield* v. *Chevrolet M. Co. etc.*, (Ia. 1924) 199 N. W. 161. But assuming it was received March 9, 1921, will the Court hold that "approximately five months" from September 10, 1920, means *six* calendar months, less one day?

In *Bloomington Canning Co.* v. *Union Can Co.*, 94 Ill. App. 62, 66, the Court said:

> "However, we are *not* of opinion the language or words used *are doubtful* in any just sense. The words used are to be given their ordinary significance. *Approximate*, as defined by Webster and other standard authorities, is to carry or *advance near;* to cause to approach; to *draw near; to approach;* and, *approximately;* with approximation; so as to *approximate nearly.* Hence we think by the use of the words of the contract, 'Your order for your season's requirements of cans *approximately* as follows,' giving the number of each class of cans to be furnished, were intended *to fix a limit beyond which* appellee *could not be forced to go.* In other words, appellant by the use of that language in effect said that the *number of cans required would approach the figure named nearly—it might not be quite so many —but not beyond, or over.* If demanded appellee was

bound to furnish the quantities named in the contract, *but no more. In this sense the expression 'more or less' is far from being synonymous with approximately, for the former words imply going beyond or over the quantity or amount named, while the latter does not.*" (See also *Rutledge* v. *White* (Ala.) 89 So. 599.)

In *Northwestern Y. C. Co.* v. *Caldwell,* 234 Fed. 491, 503, 504, it was held that a contract to furnish and deliver materials f.o.b. cars in Chicago, will be construed according to the laws of Illinois, and that in construing the contract, decisions of the state courts will be persuasive.

Under *Bloomington Canning Co.* v. *Union Can Co., supra,* then, the contract of September 10, 1920, when construed with the letter of September 27, 1920, must mean that *exactly* 150,000 tons of coal were *all* to be *delivered and accepted* in *five months,* or a little *less, but not more.*

Schedule "A" *definitely* and *exactly* specified the total amount of coal, to be furnished and taken, as "5. *Total quantity* 150,000 tons." Here are no words, such as "*approximately,*" "*about,*" "*more or less,*" or "substantially," qualifying or limiting in the *smallest* degree the total tonnage to *be taken.* No leeway is given to *either party. All* coal must be furnished and *accepted* and the time of *delivery* was made the essence of the contract by Schedule "A."

The contract of September 10, 1920, in the first sentence specifies the "*total amount*" to be paid as "$1,012,500." and in Article 2 provides that the "contractor shall *furnish and deliver* and the United States shall *accept and pay* for the articles * * * described, and *upon the terms* and conditions set forth in Schedule 'A', * * * made a part hereof." Schedule "A" reads, "Total price $1,012,500." Here no qualifying words are found as to the total price.

A contract by appellee to deliver staves to appellant in which appellee stated its desire to provide for deliveries *within the next twelve months,* and the appellant stated its

preference to have from *two to three car loads per month from the date of the contract, which would cover the whole quantity in a year or less, required appellant to receive the entire quantity within a year.* (*Mangold S. & C. Co.* v. *L. E. Moore S. Co.*, 197 F. 20, 29.) See also *Russell* v. *Clark*, 112 Me. 160, 163.

> A contract for sale of pickles was dated November 15th, 1883, and provided, 'goods to be taken between this date and January 1st, 1885.' *Held*, that under such contract the purchaser had the option to take the pickles agreed to be purchased, from time to time or all at one time, but that he was bound to take them before *January 1st*, 1885. (*Christy* v. *Stafford*, 22 Ill. App. 430, 433. Jugm't Affd. 123 Ill. 463.)

"'Approximately' simply means 'nearly' or 'closely.'" (*Oliver* v. *Hutchinson*, 41 Ore. 443.)

> "Where a tenant 'was to occupy for "*about* a month"'; and although a period thus defined cannot be precisely fixed by an exact number of days, it was clearly the intention of the parties that it should *approximate* a calendar month of 30 days and should not substantially *exceed* that number of days.'" (*Rutledge* v. *White*, (Ala.) 89 So. 599.)

In *Manhattan Life Ins. Co.* v. *Stubbs*, 234 S. W. 1099, 1105, it was held that "the word 'about' means near to or approximate."

Many of the decisions treat the word "approximately" as a synonym for the word "about" or the phrase "more or less," the use of which is for the purpose of providing against accidental and not material variation. (*Moore* v. *United States*, 196 U. S. 157, 168; *Richmond* v. *Smith & Co.* (Va.) 89 S. E. 123, 126. *Vaughan* v. *Ford*, 162 Mich. 37, 42; *Norrington* v. *Wright*, 115 U. S. 188, 203, 205, 212; *Brawley* v. *United States*, 96 U. S. 168, 171, 172; *Pine River L. Co.* v. *United States*, 186 U. S. 279, 289; 89 Fed. 907. *Gallaspy* v. *Ingersoll*, 84 So. 510, 512; *Hadley-Dean P. G. Co.* v. *Hyland G. Co.*, 143 F. 242; *Bass D. G. Co.* v. *Granite C. N. Co.*, 113

Ga. 1142; *Margoles* v. *Wise,* 91 Conn. 152, 157; *Hickman, et al.* v. *Hight,* 217 P. 878; *Wis. Realty Co.* v. *Lull,* 187 N. W. 978, 981; *Craig & Co.* v. *Jones & Co.,* 252 S. W. 574; *Costello* v. *Siems-Carey Co.,* 167 N. W. 551, 552; 1 Corpus Juris 335; *Pierce* v. *Miller,* 187 N. W. 105, 107; *Harten* v. *Loeffler,* 212 U. S. 397, 404.

The word "about" will not cover an extension of twenty days from the time specified in the contract. (*Blumenthal & Co.* v. *Gallert & Co.,* 205 N. Y. 197. See also, *Weinman* v. *Fellman,* 162 N. Y. S. 131.)

A contract stipulated for delivery "f.o.b. mines" of stated quantities of rock in *approximately* equal monthly quantities during *each year* for a stated series of years, at a specified price per ton. During these periods there were frequent suspensions of shipments to conform to the necessities of appellant's (buyer's) business to which appellee *consented.* Some months there were no shipments, and at other times they exceeded the monthly quota specified in the contract, but at the end of the year there was a deficiency in the deliveries. The appellee was always pressing the appellant to take rock, and the appellant was asking delay, *which was granted. Held*: that the correspondence showed no *more than forebearance* of the seller to insist on deliveries in approximately equal monthly quantities, and a consent to deliver the rock at other times as requested by the purchaser, with a clear recognition that the *aggregate yearly quantity* was *not to be varied.* Such *forbearance did not amount to a novation* of the contract, or to such *departure* from its terms as to *excuse* the purchaser from its obligation to *take the full amount as contracted for at the end of the year.* (*Atlantic Oil Co.* v. *Phosphate Mining Co.,* 144 Ga. 75.)

The above case is in point except that there the seller consented to the delays of the buyer, where in the instant case appellee only waited, which was all it could do. It did not consent *in writing.*

The granting of another opportunity to one of the parties to a contract to meet its terms after a previous failure so to do, is a favor given by the other party and does not constitute a waiver of the latter's right to terminate the contract. (*Brown* v. *United States,* 51 Ct. Cl. 22 (Affd. *Saalfield* v. *United States,* 246 U. S. 610, 613); *Savage Const. Co.* v. *United States,* 47 Ct. Cl. 298, 309; *Gillespie* v. *United States,* 47 Ct. Cl. 167, 171; *Titcomb* v. *United States,* 14 Ct. Cl. 263, 267; *Wilder* v. *United States,* 5 Ct. Cl. 462.)

Where under a contract of sale of a commodity, a specified quantity was to be shipped during a stated period and the seller having shipped all of the commodity ordered, requested the buyer a few days before the expiration of the time of delivery to order or receive such quantity as remained undelivered, but at the request of the latter, and on the buyer's representations that he would receive the same later, delayed shipment until after the time stipulated in the contract had expired, the buyer cannot urge such delay as a breach of the contract. He is estopped from denying his obligation to accept delivery after the expiration of the contract, and this is true even if the extension agreement is void. (*Abel* v. *Ward,* 170 Fed. 925, 927; *Kramer* v. *Great Northern Hotel Co.,* 185 Ill. 612; *Hirsch R. M. Co.* v. *Milwaukee & F. R. Ry. Co.,* 165 Wis. 220, 223; *Longfellow* v. *Moore,* 102 Ill. 289, 294; *Bayne* v. *United States,* 195 Fed. 236, 240; *Becker* v. *Becker,* 280 Ill. 117, 124; *Snare & T. Co.* v. *United States,* 43 Ct. Cl. 364, 367; *Frankfurt-Barnet Co.* v. *Prym Co.,* 237 F. 21, 24, 27, 30; *Thomas* v. *Poor,* 147 N. Y. 402, 409.)

Under the contract for the sale of pig iron to be delivered "*about equally*" during three specified months f.o.b. cars at the seller's furnace, the buyer was obligated to *accept delivery during the time specified,* and his refusal to give *shipping directions* was a breach of the contract.

Judge Lurton said (page 580):

> "The buyer was obligated to accept delivery on board cars at the furnace. The *destination* of the iron so loaded was to be determined *by himself only.* He could not under the plain terms of the agreement, say, 'I will *not give shipping instructions,*' for that would be to say, '*I will not accept delivery* on board cars at the furnace' and was a *breach of* his agreement." (*Hirsch* v. *Georgia I. & C. Co.*, 169 F. 578, 580. See also: *Jung Brewing Co.* v. *Konrad*, 137 Wis. 107, 116; *Moran B. & N. Mfg. Co.* v. *St. Louis Car Co.*, 210 Mo. 715, 736; *Robbins* v. *Hill*, 259 S. W. 1112, 1115; *Hamlen* v. *Rosengrant* (Ala. 1924) 100 So. 217, 218; *Weill* v. *American M. Co.*, 182 Ill. 128, 133; *Salmon* v. *Helena Box Co.*, 158 Fed. 300, 303.)

Paragraph 5 of the letter of August 6, 1920 (R. 23-24) refers to the preceding paragraph *which specifies delivery from August* 15, 1920, *to February* 15, 1921. (which is *six* calendar months). It reads:

> "The *cars are to be furnished so that delivery can be made as above specified.* If the *full quota of cars* are *not* furnished during any one or more weeks, then we *shall not be bound* to make up the deficiency during the subsequent weeks. But we *shall* do so if we can *without loss.*"

Here we have a document *signed by appellee,* which like Schedule "A," *prepared by appellant,* expressly makes *time of delivery of the essence,* and gives to appellee an option if appellant is in default, and appellant accepted it without qualification or reservation August 24, 1920. And further by its letter of September 27, 1920, appellant so construed the agreement of the parties.

The above quotation from the letter of August 6, 1920, is practically a statement of the law.

In *Belden, et al.* v. *Woodmansee,* 81 Ill. 25, it was decided by Mr. Justice Scholfield:

> "If the plaintiff contracts with the defendant to shell for the latter 150,000 bushels of corn, and as much more as he can before the cold weather, and through the de-

fendant's fault, he shelled only a little over one-half of the bushels named, by cold weather, the plaintiff will have the right to complete the contract after the time fixed, *if he desires,* and the defendant will have no right to avail of the stipulation as to the time the work was to be done.

The contract will be held to mean that he may shell the number of bushels named *at any rate,* and the words 'cold weather' will be understood to imply an additional amount, and the occurrence of cold weather will not authorize the employer to terminate the contract as to the 150,000 bushels, when that amount is not shelled by his own act in preventing the same."

4.

THE CONSTRUCTION OF THE TERMINATION CLAUSE OF THE CONTRACT.

Section 2 of the Contract of September 10, 1920 (R. 27-28, 10-11) reads:

"If in *the opinion of the Quartermaster General, the public interest shall so require,* this contract may be terminated by the United States by *15 day's notice* in writing from the contracting officer to the contractor, and such termination shall be deemed to be effective upon the expiration of 15 days after the giving of such notice" etc.

The notice of cancellation of a contract begins to run from the date of its receipt rather than from the date of the notice. (*Oldfield* v. *Chevrolet M. Co. etc.,* (Ia. 1924), 199 N. W. 161.

The absolute right reserved in a contract to cancel or terminate it cannot be exercised after the contract has expired as there is nothing on which to operate. The words "cancel" or "terminate" assume the existence of a contract which is to be terminated. An attempted or pretended exercise of this option after the contract has expired cannot effect the parties to the contract or the status of their rights and

obligations under it at the time of its expiration. If the option to terminate a contract is limited as to time, its exercise while the contract is in force, and after the stated time, is unavailing. Action within the prescribed time is a condition precedent. (*Dold P. Co.* v. *Kings Co. R. Co.,* 176 App. Div. 407, 411; *Maud I. B. & B. R. R.* v. *I. T. R. R.,* 133 Ill. App. 178, 187; *Vider* v. *Ferguson,* 88 Ill. App. 136, 148; *Voss* v. *Feurmann,* 23 S. W. 936; *Ward* v. *Am. H. F. Co.,* 119 Wis. 12, 20; *Weber, et al.,* v. *Am. P. Service,* 197 Ill. App. 500, 503; *Capital F. Co.* v. *Ashcraft-W. Co.,* 79 So. 484, 487; *Hardware Co.* v. *Buggy Co.,* 170 N. C. 298; *Henderson Bridge Co.* v. *O'Connor, et al.,* 88 Ky. 303, 323, 326; *Wilson* v. *Bicknell,* 170 Mass. 634; *Phillips* v. *Riser,* 8 Ga. App. 634.)

In *Ladd L. & S. Co.* v. *MacDougald C. Co.,* 114 S. E. 75, 77, it was held:

> "A contract having expired, of course all rights under the contract expired * * *. The seller could not after the expiration of the contract violate it by refusing performance of any of its terms." (See also *Riddle Co.* v. *Taubel* (Pa. 1923) 120 Atl. 776; *Gibbons* v. *United States* 8 Wall 269, 273; *Downey* v. *Shipston,* 200 N. Y. S. 479, 482; 206 App. Div. 55.)

Forfeitures are not favored by the law, and when the right thereto is assented it must be clearly and unquestionably established before the courts will enforce them. (*Handstitch B. S. M. Co.* v. *Blood,* 47 Fed. 361, 363; *City of Chicago* v. *Sexton,* 115 Ill. 230, 234; *Harley* v. *Sanitary Dist.,* 107 Ill. App. 546, 560; *Hale* v. *Cravener,* 128 Ill. 408, 418, 420; *Richey* v. *Union Central L. I. Co.,* 140 Wis. 486, 489; *Wright* v. *Bristol P. L. Co.,* 257 Pa. 552, 556, 559; Black Rescission of Contracts (1916) Vol. 2, Sec. 513, 574; *Weber, et al.* v. *Am. P. Service,* 197 Ill. App. 500, 503; *Saterlee, et al.* v. *United States,* 30 Ct. Cl. 31, 49, 53; *Hughes Bros. et al.* v. *United States,* 45 Ct. Cl. 517, 523; *Clark* v. *Barnard,* 108 U. S. 436, 448, 458; *Aetna Life Ins. Co.* v. *Palmer,* 125 S. E. 829; *Mo. S. L. I. Co.* v. *Miller,* 260 S. W. 705, 708.)

It must not be overlooked that appellant's cancellation letters of March 7 and 9, 1921 (R. 31-32) state the only reason for cancellation is "Due to the limited appropriation available for purchase of coal."

Appellant, then, must stand upon the ground that the appropriation was limited, which is no legal ground at all and was not true, and is estopped to set up any other ground of defense in this suit. The letter shows its position and the law will not allow it to make any changes or shift to some other one.

The benefit and burden of a provision in a Government contract, giving a right to annul in consequence of a breach by failure to commence work, must hang together, and the Government cannot avail of the former without accepting the latter. (*Stone & Gravel Co.* v. *United States,* 234 U. S. 270, 277, 279.)

In *Babcock* v. *Farwell,* 245 Ill. 14, 39, it was held:

> "If a party accepts the provisions of a contract which are of advantage to him, he is bound by the provisions which purport to be obligatory upon him."

The above principles are those applied by the Court of Claims in its opinion (R. 36-40).

Before an option to terminate a contract of sale can be exercised, notice must be given in accordance with its provisions. This is a condition precedent. (*Bour* v. *Kimball,* 46 Ill. App. 327, 329; *Ga. R. & B. Co.* v. *Hass,* 127 Ga. 187, 190; *Ford* v. *Dyer,* 148 Mo. 528, 540; *Brooks* v. *Trustee Co.,* 76 Wash. 589, 591; *Ward* v. *Whitney,* 148 Mass. 278; *New Haven T. Co.* v. *Gaffney,* 73 Conn. 480; *Osgood* v. *Skinner,* 211 Ill. 229; *Williams* v. *U. S.,* 26 Ct. Cl. 132, 141; *Wichita Mill & E. Co.* v. *Liberal E. Co.,* 243F 99, 102, 105.

When the right reserved in a contract to terminate it is made to depend on whether in the opinion, or it appears to the satisfaction, of the party seeking to exercise it, or of some third party named, the continuance of the contract

would be prejudicial to the welfare of some person or system, or its termination is in some interest, whether public or private, and it is provided that the damage suffered by the other party in the case of such termination shall be determined in a specified manner by specified persons, then under this reserved right the first party is not given the authority "arbitrarily to terminate the contract but only to do so when it is determined that the continuance of the contract is prejudicial or its termination is in such interest." This decision or determination must first be had. (*Anvil Mining Co.* v. *Humble*, 153 U. S. 546, 547; *Ga. R. B. Co.* v. *Hass*, 127 Ga. 187, 190; *Ford* v. *Dyer*, 148 Mo. 528, 540; *United States* v. *McMullen*, 222 U. S. 460, 470; *United States* v. *Gleason*, 175 U. S. 588, 602, 605; *Purcell E. Co.* v. *U. S.*, 51 Ct. Cl. 211, 215, 218; 249 U. S. 313, 317, 319.)

A reservation in a contract authorizing a party to cancel or terminate it upon a specified ground, or for a particular reason, does not give him the authority to exercise the right upon or for any other ground, or reason, or at will. He can act only upon the precise grounds and under the conditions prescribed, and cannot use the option to cancel merely as a means of *ridding* himself of some or all of the obligations of his contract. (*Avery P. Co.* v. *Peck*, 80 Minn. 519; *VanCamp P. Co.* v. *Smith R, & W.*, 111 Md. 565; *Hale* v. *Cravener*, 128 Ill. 408, 418, 420; *Price* v. *City of N. Y.*, 182 N. Y. 516; 104 App. Div. 198; *Larson* v. *Minneapolis T. M. Co.*, 92 Minn. 62; *McCormick H. M. Co.* v. *Knoll*, 57 Neb. 790; *Golden C. M. Co.* v. *Rapson C. M. Co.*, 188F, 179, 183; *Handstitch B. S. M. Co.* v. *Blood*, 47F, 361, 363; *Northwest Auto Co.* v. *Harmon*, 250F 832, 837.

5.

EXERCISE OF POWER TO TERMINATE THE CONTRACT—REQUIREMENTS—SUFFICIENCY OF NOTICE.

When settled general rules of construction are applied to the termination clause of the contract of September 10, 1920, it is evident that its exercise by appellant required:

(*a*) That the Quartermaster General (or Acting Quartermaster General) in good faith, should have passed upon the relation which the continued existence of the contract bore to the public interest, and that he must have formed a reasonable and not an arbitrary or capricious opinion.

(*b*) It is necessary that the termination should have been in the public interest as distinguished from the private interest of the Government, which stands before this Court as a private contractor who has agreed to purchase an ordinary commercial commodity. It would be to the private interest of any private contractor to cancel á contract because the price of coal had declined, cars were difficult or impossible to obtain, storage facilities were unavailable, or his coal bins were overfilled with coal purchased elsewhere at a cheaper price after the contract had been made.

(*c*) The cancellation letter of March 7, 1921, (R. 32), enclosed in appellant's letter of March 9, 1921 (R. 31), under no circumstances could be effective until the expiration of 15 days after its receipt. The notice did not fix the date, and termination therefore was insufficient. A peremptory immediate written cancellation is not a notice. (*Anvil Mining Company Co.* v.. *Humble,* 153 U. S. 540, 547; *Ga. R. & B. Co.* v. *Hass,* 127 Ga. 187, 190; *Ford* v. *Dyer,* 140 Mo. 520, 540; *Ward* v. *Am. H. F. Co.,* 119 Wis. 12, 20; *Miller* v. *Union Switch & S. Co.,* 132 N. Y. 562; *Johnson* v. *Union Switch & S. Co.,* 129 N. Y. 653; *Same* v. *Same,* 30 N. E. 406; *Farmers G. & S. Co.* v. *Lemley,* 181 Pac. 858, adopting Diss. Opin. 178 Pac. 640, 643, *Bixler* v. *Finkle,* 85 N. J. L. 77.)

It is a rule of construction of printed blank contracts that they be construed with care and caution in the enforcement of forfeiture clauses contained in the printed form. (*Montgomery Enterprise* v. *Empire T. Co.*, 86 So. 880, 885.)

Anvil Mining Co. v. *Humble*, 153 U. S. 540, 547, holds:

A provision in a contract for the mining, removing, and unloading by the party of the first part of ore from a mine of the party of the second part, that the party of the second part may be at liberty to terminate it at any time when he shall be satisfied that the system employed by the party of the first part is *prejudicial* to the welfare and development of the mine, and that, in that event, there shall be a reference to determine the damages sustained by the party of the first part by reason of the termination, does not give the party of the second part a right *arbitrarily* to *terminate* the contract, but only to so do when it *is determined* that the system employed is *prejudicial* to the welfare and development of the mine. (See also *Brush Swan El. L. Co.* v. *Brush El. Co.*, 41 Fed. 163, 168; *Purcell Env. Co.* v. *United States*, 47 Ct. Cl. 1, 18, 23; *Ward* v. *Am. H. F. Co.*, 119 Wis. 12, 20.)

When a waiver prevents a forfeiture of a contract the law ordinarily permits a liberal construction to be placed on the acts of the party to be charged with the waiver, with a view to bringing a waiver about. The right reserved in a contract to terminate it may be waived. So also may the right to arbitration. The waiver may even be implied from conduct of the parties which is inconsistent with the intention to declare a forfeiture. In the present case the letters of appellant amounted to a waiver. (*Wilkinson* v. *Blount Mfg. Co.*, 169 Mass. 374, 377; *Jones* v. *Brown*, 171 Mass. 318, 324; *Edwards* v. *Willey*, 219 Mass. 443, 452; *Andrews, etc.* v. *Tucker*, 127 Ala. 602, 613; *Henderson Bridge Co.* v. *O'Connor, et al.*, 88 Ky. 303, 323, 326; *Wilson* v. *Bicknell*, 170 Mass. 634; *Phillips* v. *Riser*, 8 Ga. App. 634; *Maguire* v. *Halsted*,

18 App. Div. 228; *Loftis* v. *Insurance*, 38 Utah 532, 553; *Gleason, et al.* v. *United States*, 33 Ct. Cl. 65, 86; *Pigeon* v. *United States*, 27 Ct. Cl. 167, 175.)

6.

PUBLIC INTEREST.

The attempted termination of this contract was done by appellant in its private interest as a contractor, and not in the public interest, and there is a clear distinction between private obligations and those imposed upon citizens by the sovereign for the purpose of promoting a public interest or policy. The former arises from contract and the latter are directly created by law. (*United States* v. *Montell*, 47 Fed. Cas. 15798 (Taney, C. J., and Matthews, J.); and see *Clark* v. *Barnard*, 108 U. S. 436, 448, 458; *Illinois Surety Co.* v. *U. S.*, 229 F. 527, 530; *Keating* v. *Sparrow*, 1 Ball & Beatty, 367, 373; Sutherland on Damages (9th ed.) Sec. 416a; *United States* v. *Dickerhoff*, 202 U. S. 302, 312.

The words "public interest," in Section 2 of Article 9, (the termination clause) refer to an interest, act or thing affecting the community at large of the nation. They do not relate merely to matters in which the nation may have a private or specific interest, as a contract, or litigation to which it may be a party, and certainly not a subdivision, department or bureau of the Government, but include with their meaning the whole business of the nation or state. They are so used in defining the police power. (*Lawrason* v. *Swartz*, 132 La. 511; *State* v. *Pacific Express Co.*, 80 Neb. 823, 828, 831, 835; *In re* Debbs, 158 U. S. 564; *Attorney General* v. *Delaware & B. B. Co.*, 12 C. E. Greene (N. J.) 631; *Trust Co.* v. *State* 109 Ga. 736; *Attorney General* v. *Great Northern R. Co.*, Drew & Sm. Eng., (No. 3) 154; *Wolff P. Co.* v. *Court, etc.*, 262 U. S. 522, 537.) And see cases last cited.

7.

CONSTRUCTION AND EFFECT OF NOTICE.

An option to terminate a contract must be strictly construed and strictly pursued, and a certificate or notice of default must be *specific*. (*Valente* v. *Weinberg*, 80 Conn. 134, 137, citing cases. See also *Henry Paper Co.* v. *Columbia P. B. Co.*, 185 Fed. 464, 469; *William Hanley Co.* v. *Coombs*, 60 Ore. 609.)

Appellant sent appellee two letters (one an inclosure) dated March 7 and 9 respectively. (R. 31-32.) The former is entitled "Letter of Cancellation," and was relied upon in the Court of Claims by appellant as a termination "in the public interest" pursuant to the printed terms of the contract.

These letters which originated from and were signed by a Captain of the Quartermaster's Corps at Chicago (R. 32), could not relieve appellant from liability under the contract.

When a party to a contract reserved to itself the right to terminate it upon a particular ground and seeks to rescind it, the inquiry is: whether the option has been exercised because of the existence of the specified ground or for some other groundless cause? (*Hardware Co.* v. *Buggy Co.*, 170 N. C. 298, 301; *Ashland C. & C. Co.* v. *Hull C. & Co.*, 67 W. Va. 503, 514; *Anvil M. Co.* v. *Humble*, 153 U. S. 540, 547; *Northwest Auto Co.* v. *Harmon*, 250 Fed. 832, 837; *Hale* v. *Cravener*, 128 Ill. 408, 418, 420; *Montgomery Enterprises* v. *Empire T. Co.*, 86 So. 880, 885.

The United States had no right to put appellee off its guard before the contract expired, by promises or intimations that it intended to take all the coal contracted for and then when the time for deliveries had passed to seek to take advantage of its supposed right to terminate the contract in the

public interest. The principle of estoppel forbids this. (*Brown* v. *United States*, 51 Ct. Cl. 22, (Affd. *Saalfield* v. *United States*, 246 U. S. 610; *Pierce* v. *Lukens*, 144 Cal. 397; *Longfellow* v. *Moore*, 102 Ill. 289, 294; *Mayberry* v. *Lilly M. Co.*, 112 Tenn. 564; *General E. Co.* v. *National E. Co.*, 178 N. Y. 369; *Kramer* v. *Great N. H. Co.*, 185 Ill. 612; *Nichols & S. Co.* v. *Caldwell*, 80 S. W. 1099; *Hinckley* v. *Pittsburgh Steel Co.*, 121 U. S. 264, 273.

When a contract provides for a forfeiture in case of a failure to comply with the contract in two respects, neither the one nor the other separately is cause for a declaration of forfeiture. The default must be as to both together. (*Ward* v. *Am. H. F. Co.*, 119 Wis. 12, 20; *Com. Telegraph Co.* v. *Smith*, 47 Hun. 494, 514; *Harlev* v. *Sanitary Dist.*, 107 Ill. App. 546, 560; *Northwest Auto Co.* v. *Harmon*, 250 Fed. 832, 837; *Weber, et al.* v. *Am. P. Service*, 197 Ill. App. 500, 503.)

It does not appear from the record in this case that appellant filed any special pleas or anything but the general issue.

Where a party to a contract who seeks to cancel it under a right reserved therein, is sued for breach of contract, he must show by his plea that he exercised the right within a reasonable time, or set up a legal reason for delay in cancellation, or a demurrer to the plea will be sustained. (*Coverdale* v. *Rickards & W.*, 69 A. 1065; *Capital F. Co.* v. *Ashcraft-W. Co.*, 79 So. 484, 487; *Osgood* v. *Skinner*, 211 Ill. 229; *Rogers* v. *Burr*, 105 Ga. 432; 97 Ga. 10; *Baird* v. *Hagen*, 143 App. Div. 679; *Light Co.* v. *Railway Co.*, 145 Ia. 28; *City of Indianapolis* v. *Bly*, 39 Ind. 373; *Weber, et al.* v. *Am. P. Service*, 197 Ill. App. 500, 503.)

Where, under a contract of sale the buyer refused to accept further deliveries on one of two specified grounds solely, he cannot when sued on the contract, claim a breach by the seller on any other grounds as justification. His re-

cital of the grounds mentioned waives all other grounds then existing and known to him. (*Maryland Steel Co.* v. *United States*, 235 U. S. 451, 456, 460; *Solomon* v. *United States*, 19 Wall. 17; *Dist. of Columbia* v. *Camden I. W.*, 181 U. S. 453.

A notice that a contract will be terminated under the right reserved therein should be clear, positive and explicit, and comply with the provisions of the contract. It should not be doubtful, coupled with an alternative, or extend hopes or promises. It should perform its function of giving definite notice and state the time of termination, reasons therefor, and such other details as the contract directs. (*Vidor* v. *Ferguson*, 88 Ill. App. 136, 148; *Valente* v. *Weinberg*, 80 Conn. 134, 137; *Henry Paper Co.* v. *Columbia P. B. Co.*, 185 Fed. 464, 469; *Hoggson Bros.* v. *First National Bank*, 231 Fed. 869, 872.)

When a party to a contract giving him the option to terminate it upon written notice within a prescribed time, and he on a given date by notice, peremptorily cancels the contract, such a notice is not the notice required by the contract but is a repudiation of the contract. (*Miller* v. *Union Switch & S. Co.*, 132 N. Y. 562; *Johnson* v. *S. & S. Co.*, 129 N. Y. 653; *Same* v. *Same*, 30 N. E. 406; *United States* v. *Grosjean*, 184 Fed. 593, 595; *United States* v. *O'Brien*, 220 U. S. 321, 325, 327; *Com. Tel. Co.* v. *Smith*, 47 Hun. 494, 514; *Bixler* v. *Finkle*, 85 N. J. L. 77; *Bour* v. *Kimball*, 46 Ill. App. 327.

The authority of an officer or agent to make or carry out contracts does not necessarily carry with it the authority to cancel them. (*Williams* v. *DeSoto Oil Co.*, 213 Fed. 194, 197; 13 Cyc. 1387; *Hawkins* v. *United States*, 96 U. S. 689; *Lewman* v. *United States*, 41 Ct. Cl. 470, 475, 478; *United States* v. *Walsh*, 115 Fed. 697, 701; *United States* v. *Barlow*, 184 U. S. 123, 125, 137; *Clarks Case*, 6 Wall. 546; *Smoots Case*, 15 Wall. 47; *Clark* v. *United States*, 94 U. S. 214; *United States* v. *O'Brien*, 220 U. S. 321, 325, 327.)

Any act, conduct or declaration by one party to a contract evincing a clear intention to repudiate the contract, and that it is no longer binding, amounts in law to a prevention of performance. When performance of a contract is prevented this puts an end to it, and the aggrieved party not in default, is absolved from further compliance therewith and may sue for his damages. (*Franklin* v. *Krum*, 70 Ill. App. 649, (Affd. 171 Ill. 378); *White Walnut C. Co.* v. *Crescent C. & M. Co.*, 162 Ill. App. 352, 358; *Turney* v. *Peoria G. S. Co.*, 65 Ill. App. 656; *McPherson* v. *Walker*, 40 Ill. 371; *L. S. & M. S. R. R. Co.* v. *Richards*, 152 Ill. 59, 73, 75, 80, 83, 90; *Gorham* v. *Farson*, 119 Ill. 425, 442; *Kadish* v. *Young*, 108 Ill. 170, 179; *Wight* v. *Gardner*, 66 Ill. 94; *Burnham* v. *Roberts*, 70 Ill. 19; *Hockster* v. *DeLaTour*, 20 Eng. L. & Eq. 157; *Loeb* v. *Stern*, 198 Ill. 371, 378; *Weill* v. *Am. Metal Co.*, 182 Ill. 128, 133.)

Inability of a party to a contract of sale to furnish transportation or storage facilities as required thereby because of a shortage in, or lack of such facilities, without his fault but against which he failed to provide, furnishes no excuse and he is in default. (*Read* v. *Delaware & H. C. Co.*, 49 N. Y. 652; *Berg* v. *Erickson*, 234 Fed. 817, 820; *Summers* v. *Hibbard & Co.*, 153 Ill. 102, 109; *Carnegie Steel Co.* v. *United States*, 240 U. S. 156, 165; *The Harriman*, 9 Wall. 161, 172; *Hesser, etc. Co.* v. *LaCrosse F. Co.*, 114 Wis. 654.)

8.

APPELLANT DELIBERATELY DISABLED ITSELF FROM PERFORMING THE CONTRACT WITH APPELLEE.

The Court of Claims found (R. 33) that after appellant had made its contract of September 10, 1920, with appellee, it made a contract with the Emmons Coal Company of Philadelphia, Pa., under which the latter supplied over 170,000 tons of coal, at a price of $5.50 per ton, to appellant in the

Chicago District during the period between September 10, 1920 and March 7, 1921.

A *party to* a contract cannot wilfully and in bad faith disable himself from complying with any condition of the contract, nor fraudulently prevent performance by the opposite party and thereby derive any benefit or escape any liability. (*Householder* v. *Nispel,* 195 N. W. 932.)

Where one of the parties to a contract subsequently makes additional contract with others for the purchase of increased quantities of the same commodity, thus overloading his facilities for handling the same, he is not excused for defaulting on his original contract. (*Davison Chem. Co.* v. *Baugh C. Co.,* 106 Atl. 269, 271; *Acme Mfg. Co.* v. *Arminius Chem. Co.,* 264 Fed. 27, 34; *Iron T. P. Co.* v. *Wilkoff* (Pa. 1922), 116 Atl. 150, 152; *Richmond Ice Co.* v. *Crystal Ice Co.,* 99 Va. 285; *Day* v. *Jeffords,* 102 Ga. 714; *Read* v. *Delaware & H. C. Co.,* 49 N. Y. 652; *Emack* v. *Hughes,* 74 Vt. 382; *Lozes* v. *Segura Sugar Co.,* 52 La. Ann. 1844; *Boehme & Rauch* v. *Lorimer,* (Mich. 1922), 191 N. W. 8.)

Where seller shipped to *other* customers on orders received at a *higher* price after the acceptance of buyer's order, the rule as to impossibility of performance was not applicable. (*Spanish R. B. Co.* v. *Dobbertin,* 196 N. Y. S. 770, 772; See *Boehme & Rauch* v. *Lorimer,* (Mich. 1922) 191 N. W. 8, 10; *Foye T. & T. Co.* v. *Jackson* (Fla. 1923) 97 So. 518, 520.)

In *Downey* v. *Shipston,* 200 N. Y. S. 479, 482; 206 App. Div. 55 (1923), it was held:

Evidence that a switchman's strike was in operation, when a contract to deliver 6,000 tons of coal was executed, and that federal coal *embargoes* and priority orders did not become *effective* for more than two and one-half months *after* the contract was executed, did not excuse nonperformance of the contract, in view of the fact that the seller, a coal jobber, owning no mines, managed to obtain 365,000 tons of coal

during the year, practically all of which was sold on miscellaneous day to day orders. The Court said (p. 482):

> "The outstanding fact is that appellee did get and deliver coal to the appellant and others. Evidently it was only a question of price."

In *Tirrell* v. *Anderson,* (Mass. 1923) 138 N. E. 569, 571, it was held:

Defendant's disablement of itself to perform a contract, to manufacture and sell tacks, *at his place of manufacture,* by *reason* of *sale* of his business, held *not* necessarily to *preclude* performance *elsewhere,* within a reasonable time for performance. (See also: *Gray & Co.* v. *Cavalliotis,* 276 Fed. 565, 570; *New Prague F. M. Co.* v. *Spears,* (Ia. 1923) 189 N. W. 815, 821, 823.

In *Hoyt* v. *Tapley* (Me.) 116 A. 559, 562, it was held:

Stipulation making seller's obligation to deliver, contingent on weather conditions beyond seller's control, was not available to excuse nondelivery, where seller, notwithstanding weather conditions, shipped goods *to other buyers.*

II.

The correct measure of appellee's damages.

Paragraph 5 of the second amended petition alleges that the contract, although not specifying the date of its expiration

> "by its terms * * * *expired* on *to wit* the first day of March, A. D. 1921, and that up to and *including to wit,* the first day of March, A. D. 1921, both the parties to said contract treated it as remaining in full force and effect."

Under the foregoing allegation the appellee could prove an expiration of the contract in 1921 on February 9, 10, or 15, March 1, or March 9, (the date of repudiation).

The office of a *videlicet* is to indicate that the appellee does not undertake to prove the precise circumstances as alleged. (*Chicago T. R. Co.* v. *Young,* 118 Ill. App. 226, 229; Bouvier Law Dic., 3rd Rev. Vol. 3, p. 3400. Citing *Brown* v. *Perry,* 47 Ill. 175, 177, and other authorities.)

In *Long* v. *Conklin,* 75 Ill. 32, where the declaration alleged under a *videlicet* that the contract sued upon was made on November 28, 1871, and the proof showed that it was made in January, 1872, the Court said:

> "The day of making the contract is laid under a *videlicet,* and according to the familiar rule of pleading is not required to be proved *as laid.*"

(See also: *Chicago G. W. Ry. Co.* v. *People,* 79 Ill. App. 529, 531; Affd. 179 Ill. 441; *Collins* v. *Sanitary Dist.,* 270 Ill. 108, 111.)

The prayer of the second amended petition prays judgment as of "to wit, the 9th day of March, A. D. 1921, and such further and other relief to which it may appear petitioner is entitled." (R. 6.)

In *Norris, Inc.* v. *Reed & Co.,* 278 F. 19, 22, it was held:

A petition, by *seller* to recover damages, for breach of contract by buyer, praying for the difference between the contract price and market price, *at the time the contract was repudiated, "and for all other relief"* to which plaintiff might be entitled, held *sufficient* to authorize the recovery of such difference *at the time* fixed for *delivery.*

When at the time of making a contract to be performed in the state, where made, there is a settled rule of decision in that state as to the damages recoverable for its breach, such rule governs in an action for its breach in a federal court. (*Gilman* v. *Lamson Co.,* 234 F. 507. 518.)

Where a contract for the sale of pig iron is *entire,* and the buyer repudiated it, no part of the purchase ever having been delivered, the seller's measure of damages was the difference between the market value at the *time of repudiation and the price, though the iron was to be delivered in installments,* and payment was to be made thirty days after arrival of each car. (*Moffatt* v. *Davitt,* 200 Mass. 452, 457; See also, *Barrie* v. *Quimby,* 206 Mass. 259, 267; *Imperial R. S. Co.* v. *Steinfeld Bros.,* 232 Pa. 399.

The rule of damages under the decisions of the United States Supreme Court, as well as in Illinois is: That when performance has been commenced, but completion has been prevented by one party, the innocent party may abandon it and recover as damages the profits which he would have received through full performance. That is the difference between the contract price and the market price. (*Kadish, et al.* v. *Young, et al.,* 108 Ill. 170; *Lake Shore & M. S. R. R.* v. *Richards,* 152 Ill. 59, 73, 75, 80, 90; 30 L. R. A. 33 and notes pp. 43, 48; *Roehm* v. *Horst,* 178 U. S. 1, 16, 20.)

In a very recent case, *Garfield & P. C. Co.* v. *New York N. H. & H. R. Co.* (Mass. 1924) 143 N. E. 312, it was held that the seller on breach of contract to receive coal was entitled to recover the difference between the contract and the market or current price at the time of the breach. (See also *Union B. F. Co.* v. *Barker Fuel Co.* (S. C. 1923) 117 S. E. 735, 738.)

The *Garfield case* shows the accuracy of the testimony of appellee as to cost of production and *market value* of bituminous coal. The Court said (p. 313):

> "The cost of producing coal from January 15, *1921,* to April 1, 1921, was $3.10 per ton. The *market price was* $2.00 per ton."

The Court also said:

> "The plaintiff was entitled to the *profits* of the contract * * * The commodity to be sold by the plaintiff to the defendant under the contract was *a staple product* for which there was an available and open market."

Where sellers had purchased raisins transported to them by usual means from *third person* and had performed *no labor* and purchased *no material after* buyer's *attempted* cancellation, the measure of damages on buyer's refusal to accept was the difference between the contract price and *the market price* at the place of delivery. (*Pandaleon* v. *Brecker,* (Mich. 1924) 198 N. W. 953; see also *Rees* v. *Bowers Co.,* (Pa. 1924) 124 A. 563.)

It was suggested in behalf of appellant in the Court of Claims that the measure of damages should be the difference between the contract price and the cost of the production of the coal.

In *Grace & Co.* v. *Nagle,* 275 F. 343, 345, the Court said:

> "The objection to the method of assessing damages is that the Court below allowed plaintiff the difference between the contract price and market price of plates, whereas it was contended that the award should have been of the difference (if any) between the cost of production and the contract price.
>
> (4) The argument rests on such cases as *Hinckley* v. *Pittsburgh, etc. Co.,* 121 U. S. 264; 7 Sup. Ct. 875; 30 L. Ed. 967, and *Kingston* v. *Western, etc. Co.,* 92 Fed. 486; 34 C. C. A. 489. In all such cases the contract was for the making by the vendor of a peculiar or especial kind of goods, for which it could not be said that there was any market value except such as was produced by the efforts of the vendor alone. Under such circumstances it is plainly dangerous, and unusually unjust, to let the vendor establish his own market; hence the ruling.
>
> In this case the slabs were to be made into plates of such size as should be directed, but the evidence is clear and uncontradicted that all the contemplated sizes were articles widely dealt in in the open market, and quoted from day to day in trade publications of authority."

In *Bagley* v. *Findlay,* 82 Ill. 524, it was held:

> "Where the vendee of goods sold at specific price, refuses to take and pay for them, the vendor may store them for the vendee, give him notice that he has done so, and then recover the full contract price, *or he may keep*

the goods and recover the excess of the contract price over and above the market price of the goods at the time and place of delivery, or he may, upon notice to the vendee, proceed to sell the goods to the best advantage, and recover of the vendee the loss, if they fail to bring the contract price."

See also, *McNaught* v. *Dodson,* 49 *id.* 446.

Sleuter v. *Wallbaum,* 45 *id.* 43.

In *Burnham* v. *Roberts,* 70 *Ill.* 19, 24, it was held:

"A defendant may dispense with an offer to perform by the plaintiff, by refusing to go on with the contract, or he may, in other modes, dispense with such an offer.

Where a seller sues for the breach of a contract to purchase, and retains the title to the property, the measure of damages is the difference between the value of the property at the time fixed for delivery, and the contract price."

In *Kadish et al.* v. *Young, et al.,* 108 Ill. 170, the Court held:

"In ordinary cases of contracts for the sale of personal property for future delivery, where the purchaser fails to receive and pay for it at the stipulated time, the measure of damages is the difference between the contract price and the market or current value of the property at the time and place of delivery, and *this rule is not affected by notice to the seller by the buyer before the day of delivery* that he will not receive the property, unless the seller, upon receiving such notice, *shall elect* to then terminate the contract."

Appellant in its brief pp. 7-8) quotes from the petition of appellee to show that the latter is the sole owner of the claim which is the subject of this litigation, and would therefore limit petitioner to a recovery of "only the loss *it* actually sustained." As will be pointed out hereinafter, appellee is the sole *legal owner* of the claim and the *only one* who could maintain this action against the United States in the Court of Claims. Appellant cites *United States* v. *Smith,* 94 U. S. 214, 218, 219; and *United States* v. *Wyckoff P. and C. Co. Inc.,* 271 U. S. 263 in support of this argument.

United States v. *Smith, supra,* held that the United States was liable in the Court of Claims for improper suspension of the work of the contractor. It appears that the contractor was stopped in his work by the post-commander, with the approval of the commander of the department. The matter was referred to the Quartermaster-General and by him submitted to the Secretary of War. Pursuant to the orders of the latter the contractor was permitted to resume work. The contractor was allowed to recover such damages as were the necessary consequence of the suspension. (pp. 215-216.) The Court (p. 217) cited *Smoot's case,* 15 Wall. 47, to the effect

> "That the principles which govern inquiries as to the conduct of individuals, in respect to their contracts, are equally applicable where the United States are a party. The same rules were applicable in the case of the Amoskeag Company, 17 Wall. 592."

The Court also said (p. 218):

> "The United States can be required to make compensation to a contractor for damages which he has actually sustained by their default * * * But this is the extent of their liability in the Court of Claims. More than compensation for damages actually sustained can never be awarded against the United States, (p. 219) * * * The whole contest evidently was as to the sufficiency of the evidence, not as to the liability of the United States if the facts as claimed were established by the proof."

In the *Smith case* no authorities were cited and the above quotations show the nature of the controversy.

United States v. *Wyckoff P. & C. Co., Inc.,* 271 U. S. 263, 267, was another case where the United States was guilty of *delay* in performing its part of the contract, and it was held that the measure of the contractor's damages was not the difference between the contract price and the higher market value of the work at the time of performance, but the loss actually sustained as the result of the delay (p. 266). The Court cited *United States* v. *Smith,* 94 U. S. 214, and other cases. But the Court in discussing the question of

damages said (p. 267): "The contractor's contentions, however ignore the rule that *damages for delay* are limited to the actual loss incurred."

The Court of Claims was reversed.

In *Samuels* v. *E. F. Drew & Co.*, 292 F. 734, 738, it was said:

> "The law seeks to give the injured person, *the value of the contract* of which he has been deprived, no more and no less, and the question here is: 'What was that *contract right* worth on October 30, 1920? And the answer is that such sum is to be determined by taking the difference between the *contract and market prices* on the date of the breach for the same quality of goods, not for immediate delivery, but for delivery at the time and place specified in the contract. *Roehm* v. *Horst*, 178 U. S. 1."

In considering the *value of this contract* to appellee it must not be overlooked that while, in its proposal of August 6, 1920, it specified three mines of *three distinct mining companies*, from which coal was to be furnished it reserved the right to *"shift the tonnage"* (R. 24) and actually, *without objection from appellant, did shift* the tonnage so that the major portion of the coal delivered to, accepted by and paid for, by appellant, was produced from the White Ash mine, whose president was president of the appellee company, which subsequently purchased said mine. (R. 29-30.)

In *United States* v. *Spearin*, 248 U. S. 132, 135, 138, it was held that the Government, having annulled a contract for the building of a dock and reconstruction of a sewer was liable for all damages resulting from the breach, including the contractors proper expenditures on the work (less receipts from the Government) and *the profits he would have earned* if allowed fully to perform, 51 Ct. Cl. 155, 181, 184 affirmed. See also *Anvil Mining Co.* v. *Humble*, 153 U. S. 540, 549; Sutherland on Damages (3rd Ed.) Vol. 3, Sec. 664; *United States* v. *Behan*, 110 U. S. 338, 344-345.

Where the buyer of goods under an executory agreement breaches his contract by refusing to accept the commodity which is the subject of sale "the measure of damages is the difference between the contract price and the market price of the goods at the time when and the place where the contract *should have been performed.*" (Williston Sales, Vol. 2, Sec. 582, and cases cited; Sutherland on Damages, (3rd ed.) Vol. 3, Sec. 646, p. 1853, Sec. 647, p. 1856.

Gibbons v. *United States,* 8 Wall. 269, 273, affirmed a judgment of the Court of Claims. As a measure of damages for the refusal of the Government to receive a part of the grain, which was the subject of the contract, and which appellant offered to deliver within the time fixed by the contract, the Supreme Court took the difference between the *contract price and the market price* at the time for delivery, but denied a recovery to appellant because the market price was *more* than the contract price "so that the presumption is that he was benefitted instead of injured by the refusal of the officer to accept the oats when offered." (p. 273.) A portion of the two hundred thousand bushels of oats had been delivered but the residue was refused because the United States "had not convenient storehouses for it." Note 1 of the syllabus reads (p. 269):

> "In the Court of Claims the government is liable for refusing to receive and pay for what it has agreed to purchase.

Cited in: *United States* v. *White Oak Coal Co.,* 5 Fed. (2nd) 439, 441; *Langford* v. *United States,* 101 U. S. 341, 346; See also as to measure of damages, *Salmon* v. *Helena Box Co.,* 158 Fed. 300; *Leyner E. W. Co.* v. *Mohawk C. L. Co.,* 193 Fed. 745, 747; *Kinkead* v. *Lynch, et al.,* 132 Fed. 692, 696.

In *N. Jacobi H. Co.* v. *Vietor,* 11 F. (2d) 30, 33, it was said (p. 33):

> "In the case of a buyer's breach of a contract for the sale and purchase of goods the seller has an election of

> three remedies: (1) To treat the property as his own and sue for damages * * * In the case at bar the seller's selected to pursue the first of the remedies mentioned, and all questions *as to what price they obtained or might have obtained* upon a resale of the property are foreign to the issue in controversy, which as stated above, was the difference *between the contract price and the market price* at the time fixed for delivery."

(*Roomberg, et al* v. *Borden, et al.*, 292 F. 321, 325. See also *Parrish M. Co.* v. *Martin-Parry Co.*, 131 A. 710, 714; 285 Pa. 131; *Quaker M. Co.* v. *Standard T. C. Co.* (Del. Sup. Ct. 1923) 123 A. 131, 134; *James R. L. Co.* v. *Smith* (Va. 1923) 116 S. E. 241, 244).

Appellee is entitled to the benefit of his contract. (*Iron T. P. Co.* v. *Wilkoff Co.* (Pa. 1922) 116 A. 150, 152; *Georgia M. O.* v. *Jones, et al* (Ga. App. 1925) 126 S. E. 865; *Georgia Refining Co.* v. *Augusta Oil Co.*, 74 Ga. 497, 507; *Summers* v. *Hibbard & Co.*, 153 Ill. 102, 109, 111; *Belden, et al.* v. *Woodmansee*, 81 Ill. 25; *Bagley* v. *Findlay*, 82 Ill. 524.)

In a seller's action for damages from a buyer's breach of a contract for the purchase of hops, where there was no allegation in the complaint that the hops were *resold*, or as to the *price for which they were resold*, the measure of damages was the difference between the contract price and the market price at the time and place of delivery. (*Pabst Brewing Co.* v. *Horst Co.*, 229 F. 913, 917.)

In *Jacobson* v. *Horner* (N. D. 1923) 193 N. W. 327, 330, the same rules are employed by the court and Williston on Sales, pp. 967, 968, is quoted.

Where *no notice of an intention to resell* personal property is given by seller to buyer who has failed to take the property, it *will be presumed* seller had "elected to keep" the property, "with the right to hold" the buyer "for the difference between the contract price * * * and the market

price." (*Fleming Co.* v. *Edmonds, et al.* (Tenn. 1923) 250 S. W. 545, 546.

> "The measure of damages for the breach of contract of sale of personal property is the difference between the market and the contract price. This rule applies to *manufactured articles* when they are *staple and have a known value* and a ready sale."
>
> *Manhattan C. I. & Ry. Co.* v. *General Electric Co.*, 226 F. 173, 174, Citing 2 Sedgwick on Damages, Sec. 752, p. 1568 (9th ed.)
>
> Williston on Sales, Sec. 654, and cases. Followed in *Jobbers Overall Co.* v. *Deputy Co.* (Neb. 1923) 192 N. W. 210, 212. See also,
>
> *In Re Bellevue P. & F. Co.*, 187 F. 169, 174.
>
> *Garfield & P. C. Co.* v. *New York N. H. & H. R. Co.*, (Mass. 1924) 143 N. E. 312.

In *Georgia Refining Co.* v. *Augusta Oil Co.*, 74 Ga. 497, 507, the Court said:

> "Where the buyer agrees to purchase personal property from the seller and pay a certain price for it, and then refuses to take it and pay for it, then the seller *may keep it as his own* and recover the difference between the market price at the time and place of delivery, and the contract price as the measure of damages for the buyers breach of the contract. Such is the law. Benjamin on Sales, Sec. 1165; 2 Watts & Sergt. 219; 63 Mo. 567; 12 N. Y. 50; 7 Watts 239; *Groover* v. *Warfield, et al.*, 50 Ga. 644."

Followed in *Georgia M. O.* v. *Jones, et al.* (Ga. App. 1925) 126 S. E. 865, where it was held the seller could recover under this rule, although he actually sold the property in a *foreign market at a price in advance of the market price* at the place for delivery. The buyer having breached the contract could not have the benefit of seller's ingenuity and business acumen in making a profit upon the sale of his own property in another market, and incurring the risks and haz-

ards incident thereto. As to the quotation in 74 Ga., see *Leyner E. W. Co.* v. *Mohawk C. & L. Co.,* 193 F. 745, 747; *Kinkead* v. *Lynch, et al.,* 132 F. 692, 696.

In *Western A. M. Co.* v. *Dunn* (Wyo. 1924) 223 P. 221, 222, the court applied the general rule as to the measure of damages and upheld a recovery by the plaintiff seller, saying (p. 222):

> "He could *keep* or resell the goods *as he chose,* and his refusal to act upon defendants offer did not affect the measure of damages. This follows from the principle that the buyer in such cases cannot take advantage of a *resale of the goods for more than the market* price at the time when the goods ought to have been accepted. 35 Cyc. 598; Benjamin on Sales (6th ed.) p. 931; *Bridgford* v. *Crocker,* 60 N. Y. 627; *Duncan* v. *Wohl South & Co.,* 201 App. Div. 737; 195 N. Y. Supp. 381;" etc.

The offer referred to in the above quotation was made by defendant after plaintiff started his suit.

Where the buyer of coal under a contract to take so many cars a month, assumes the duty of providing the cars on which point the contract is silent, his failure to provide enough cars is such a breach as entitles the seller to damages. (*Consolidated Coal Co.* v. *Schneider,* 163 Ill. 393, 397, (Cited in 6 L. R. A. (n. s.) 929n, 930n.)

And see *Harman* v. *Washington Fuel Co.,* 228 Ill. 298, 301, 304, where it was held among other things:

> "The measure of damages for failure to deliver coal under contract, for delivery of specified number of tons between two dates, is the difference between the contract price and *the market price on the latter date* at the place of delivery."

The motive of the appellant in breaching the contract is not material upon the issues of the assessment of appellee's actual damages. The appellee is entitled to his full actual damages for the breach, regardless of the motive that induced its breach. (*Hattiesburg L. Co.* v. *Herrick,* 212 Fed. 834, 848.

See also *General E. Co.* v. *Chattanooga C. & I. Co.*, 241 Fed. 28, 43; *Stranahan Co.* v. *Coit*, 55 O. St. 398, 407, notice 408; *Moyer, et al.* v. *Gordon*, 113 Ind. 282, 284; *Baumgarten* v. *Alliance Ins. Co.*, 189 Fed. 275; *Western Union Tel. Co.* v. *Rowel*, 143 Ala. 205, 209; *Hunter* v. *Sutton*, 205 Pac. 785, 788 (Nev. 1922); *Brown* v. *Chicago, etc. Ry. Co.*, 54 Wis. 342, 354; *Magnolia Metal Co.* v. *Gale*, 189 Mass. 124, 133; *Gebbart* v. *Burkett*, 57 Ind. 381.)

The seller is not required to tender delivery of goods under a contract after notice of a repudiation from the buyer that they would not be accepted, *nor to show that he had the goods on hand.* This is especially true in this case in view of the provisions of the contract. (*Raymond* v. *Phipps*, 215 Mass. 559, 562; *Lake Shore & M. S. R. R.* v. *Richards*, 152 Ill. 59, 73, 75, 80, 90; 30 L. R. A. 33, and notes 43, 48; *Osgood* v. *Skinner, et al.*, 211 Ill. 229, 230; *Moyses* v. *Schendorf*, 238 Ill. 232, 234; *Cohen* v. *Segal*, 253 Ill. 34, 42; *Lang* v. *Hedenberg*, 277 Ill. 368, 376; *Sanborn, et al.* v. *Benedict*, 78 Ill. 309; *Burnham* v. *Roberts*, 70 Ill. 19, 24; *Hinckley* v. *Pittsburg Steel Co.*, 121 U. S. 264, 268, 272; *Franklin* v. *Krum*, 70 Ill. App. 649 (Affd. 171 Ill. 378); *White Walnut C. Co.* v. *Crescent C. & M. Co.*, 162 Ill. App. 353, 358, (Affd. 254 Ill. 368, 374, 377.)

The price paid by the seller for an article by him sold and to be delivered in the future, is not a circumstance to be taken into consideration in determining the amount of damages the seller is entitled to recover upon the buyer's refusal to receive and pay for the property; and evidence of what the property cost the seller is irrelevant and immaterial. (*Kadish, et al.* v. *Young, et al.*, 108 Ill. 170; *Saylor* v. *United States*, 14 Ct. Cl. 453, 461; *Raymond* v. *Phipps*, 215 Mass. 559, 562.)

If the defendant in an action against him to recover damages for breach of contract seeks to rely on some provision of the contract excusing performance upon the happening of certain events, the burden of establishing such facts or

the happening of such events is upon him. (*Rockhill I. & C. Co.* v. *City of Taunton*, 273 Fed. 96, 102; *Boehme & Rauch* v. *Lorimer* (Mich. 1922) 191 N. W. 8; *Weber, et al.* v. *American Posting Service*, 197 Ill. App. 500, 503; *Roehm* v. *Horst*, 178 U. S. 1; Tiedeman on Sales, Sec. 333; 2 Mechem's Sales, Sec. 1091.)

III.

Under the contract and particularly the facts in this case, appellee was a principal, and the sole and only party to it other than appellant. Appellee was not merely a broker, factor or other agent for the three coal mining companies mentioned in the contract so far as appellant's rights and obligations are involved. All the coal was to be "produced" and was "furnished" by appellee and no one else from the mines of three other corporations (Findings III, IV, VI, XI and XII; R. 23-26, 29-30, 33).

Schedule "A" of the contract of September 10, 1920, required appellee to give a bond, in the sum of $105,000 with one surety, which it did, as alleged in the petition.

No mining company, nor any one else, was asked to sign the proposal of August 6, 1920, the contract of September 10, 1920, or said bond. No mining company, or other party except appellee, took part in the negotiations, with appellant before, or at the time, these documents were executed. And after the execution, of each and all of them, all the correspondence, interviews, and dealings were between appellee and appellant alone. The appellant recognized no one but appellee. Appellant's officers being familiar, as shown by the record, with the customs of selling coal in Illinois (R. 29, 30), knew that it is the selling company, not the mining company, which handles the financial end of the coal business and therefore chose to deal with appellee, a coal selling company, rather than a mining company. (*Haas L. Co.* v.

Harty, 169 Ill. App. 323, 325.) Note: Appellee's twentieth request for a finding of fact (R. Ct. Cl. pp. 579-580) reads:

"(20. If there are *no orders* the coal is started rolling, and *sold in transit*. For instance, a coal company ships to itself in Chicago, or some point, and sells it rolling.

The general practice in selling coal was unless shipping directions were sent to the mine, to load and ship the cars to some central point line like Chicago, consigned by the operator to himself, and there sell it on the market, and this was the only way the operator could sell his coal.

Major Stayton was familiar with the methods of selling, loading and shipping coal in the field where these mines were located.")

Appellant looked to the responsibility of appellee and its bond. Appellant sent its shipping instructions and its requests for suspensions to appellee only. Had *appellee* defaulted, is there any doubt that appellant would have looked to appellee for satisfaction in damages? Would, or could, it have looked to any mining company? *Appellee* billed the coal to appellant setting out their contract as required thereby, and appellant *paid appellee, not* the mining companies. Through the months of their dealing, they construed the contract, although, in respect to the questions we are now discussing, it needed no construction, being clear, definite and unambiguous. Appellee's relations *to the mining companies, its interest in the coal sold, and to be sold, or in the proceeds, or its profits on the sale of the coal are matters which appellant had, and can now have, no concern.* It is too late now for appellant to raise such questions. It is estopped by its letters, interviews, payments and entire course of conduct.

Appellant sent to *appellee*, finally, its belated letters attempting cancellation of an extinct contract. Every clause of Article 8 and Section 2 of Article 9 which require payment by the United States in case of cancellation or in the event of its delay or default recite it shall pay "the contractor."

Who other than appellee was or could be referred to?

From August 5, 1920, when the negotiations began, until March 9, 1921, appellant treated appellee as *a principal,* not as a *factor,* broker, or some other kind of agent, representing mining companies. Nor could the fact that appellee, as *to the mining* companies, was a factor, prevent appellee, *as a principal,* from contracting with appellant, or anyone, to sell, as *principal,* coal, ice, steel, or fruit, if it saw fit. If its contracts with the mining companies required it, for instance, to devote all its time to their business, that would be no affair of a party, with whom it might contract, and could not affect the validity of such contract. Appellee would have been a *principal* under its contract with appellant if it had *neither owned, nor controlled, a pound of coal, nor represented a single mining company.* The only difference in that case being it would have had to put itself in shape to carry out its contract, by contracting for the necessary quantity of coal, or bought it in the open market, to avoid liability for breach of its contract. (*Downey* v. *Shipston,* 206 App. Div. 55; 200 N. Y. S. 479, 481, citing *Maryland D. & C. Co.* v. *United States,* 241 U. S. 189; *Christy* v. *Stafford,* 22 Ill. App. 430, 433. Affd. 123 Ill. 463; *Interstate I. & S. Co.* v. *N. W. B. & I. Co.,* 278 Fed. 50, 53; *Read* v. *Delaware & H. C. Co.,* 49 N. Y. 652; *Berg* v. *Erickson,* 234 Fed. 817, 820; *Summers* v. *Hibbard & Co.,* 153 Ill. 102, 109; *Richmond Ice Co.* v. *Crystal Ice Co.,* 99 Va. 285; *Carnegie Steel Co.* v. *United States,* 240 U. S. 156, 165; *Sun P. A.* v. *Moore,* 183 U. S. 642; *The Harriman,* 9 Wall. 161, 172; *Day* v. *Jeffords,* 102 Ga. 714; *Lake Shore & M. S. Ry. Co.* v. *Richards,* 152 Ill. 59.)

The contract sued on here is mutual and its obligations are reciprocal. When it was executed it became the duty of the appellant to order coal, provide cars, and accept and pay for the coal. It became its duty to put itself in shape to perform; to have available places to receive and store the coal. If its available storage space was insufficient, it was obligated to

procure more and its failure to do so is no defense to an action for a breach of contract. (*Snare & T. Ct.* v. *U. S.*, 43 Ct. Cl. 364, 367; *U. S.* v. *Speed*, 8 Wall. 77, and cases last above cited.) The contract required appellant as well as appellee be able and ready to perform. If the law was otherwise stock exchanges and boards of trade would have to close their doors.

The mining companies cannot sue the appellant. Will the law by subterfuge let appellant escape the consequences of its conduct?

Whether appellee is principal or factor it can sue and recover in its own name, for its own use, or the use of the mining companies, or both, the difference between the contract and market prices of the coal and apportion these damages according to their existing legal interests.

On this branch of the case the following authorities appear decisive: (*Cincinnati N. O. & T. P. Ry. Co.* v. *United States*, 53 Ct. Cl. 25; *Raymond* v. *Phipps*, 215 Mass. 559, 562; *Kadish, et al.* v. *Young*, 108 Ill. 170, 186; *Groover* v. *Warfield*, 50 Ga. 644, 654; *U. S. Tel. Co.* v. *Gildersleve*, 29 Md. 232, 246; *Smith & Son* v. *Bloom*, 159 Ia. 592, 597; *Roosevelt* v. *Doherty*, 129 Mass. 301, 303; *Weber* v. *Columbia Amusement Co.*, 160 App. Div. 835, 837; *Letterman* v. *Charlottesville L. Co.*, 110 Va. 769, 772. And see *Camp, et al.* v. *Gress*, 250 U. S. 308, 320; *Wesson* v. *Galef*, 286 F. 621, 623.)

There is another principle controlling here. Without the consent of the Government no principal can be forced into a contract between the Government and a contractor for the performance of governmental work or the purchase of Government supplies. A third person, because he may have a contract with such contractor, cannot recover against the United States in the Court of Claims. He is a mere agent, employe, or sub-contractor. (*Kellogg* v. *United States*, 7 Wall. 361, 364; *Cincinnati N. O. & T. P. T. Co.* v. *United States*, 53 Ct. Cl. 25; *United States* v. *Illinois Surety Co.*, 244 U. S. 376; 226 Fed. 653; *United States* v. *Axman*, 152 Fed.

816; *Saylor* v. *United States,* 14 Ct. Cl. 453, 461; *Hughes* v. *United States,* 4 Ct. Cl. 64, 72; *Kadish* v. *Young,* 108 Ill. 170, 186; *Raymond* v. *Phipps,* 215 Mass. 559, 562; *Iron T. P. Co.* v. *Wilkoff Co.,* 116 A. (Pa.) 150, 152.)

In *Am. C. Co.* v. *Interstate I. S. Co.,* 291 Fed. 1006, it was held that knowledge of a coal dealer, from whom plaintiff purchased, of plaintiff's contract with the Government, would not justify plaintiff's repudiation of its contract with the coal dealer, because the United States had repudiated its contract. The dealer and the Government had no contract and the latter never directed plaintiff to make a contract with the dealer. The coal dealer was not a sub-contractor. (See also *Jones & Co.* v. *Bond* (Cal. 1923) 217 Pac. 725, 727.)

Carey v. *Becker,* (Neb. 1924), 198 N. W. 877, 878, holds that one party to a contract may not substitute a third person in his stead without the consent of the other contracting party. This would seem plain.

Where party enters into contract in his own name for sale of property and it is not shown by the contract he is acting for others in action brought by him, he must be treated as sole party in interest though he may have been acting for undisclosed principals. (*St. Louis S. & R. Co.* v. *Nix,* 224 Pac. 982.)

Where a buyer, who contracted to purchase iron bars had a contract with the Government, of which the *seller had knowledge,* to make anchor chains, the *cancellation of the Government contract* for the chains under Acts of 1917, and 1920, did *not authorize the buyer* to cancel *his contract for the bars,* since the seller was not a sub-contractor but acted independently. (This was a war contract.) Judge Baker said (p. 1007):

> "But no governmental agency *ever entered into any contract with this seller of iron bars, or ever directed or required this buyer so to contract.*"
>
> *American Chain Co.* v. *Interstate I. & S. Co.,* 291 F. 1006.

In *Okmulgee Coal Co.* v. *Hinton,* 218 P. 319, 322, it appears that the defendant company obligated itself to sell coal to Hinton. Thereafter the Leonard Company contracted with Hinton "to receive and sell the coal for the latter at a stipulated price." The defendant breached its contract with Hinton thereby preventing him from carrying out his contract with the Leonard Company. The Leonard Company and Hinton jointly sued defendant. The Court said (p. 322), referring to a judgment below in favor of plaintiffs,

> "the result is that, *though* the defendant *made no contract* with the Leonard Company, never promised to sell it any coal, or deliver any to it and through the Leonard Company never promised *this defendant* to buy any coal or receive any coal, yet there is now a joint judgment in its favor * * * we are unable to perceive any such privity between the Leonard Company and the Okmulgee Coal Company (defendant) as would entitle the former to participate in this case as a party plaintiff."

See also

Griffith D. Co. v. *Alton M. Co.,* 217 P. 1047.
Fairbanks M. & Co. v. *Farmers U. E. Co.,* 205 P. 367.

In *Kunzman* v. *Petteys* (Colo. 1923), 221 P. 888, 890, it was held that *public policy does not* prevent one from making a *valid* agreement to sell or dispose of property which he *does not own at the time.* (The Court said (p. 889):

> "There is no allegation * * * that the defendants contract of sale was ever brought to the attention of the corporation or its officers or approved or ratified by it. So far as concerns this case and the rights here, the oral agreement was between two parties who were competent at the time to make it."

In *Downey* v. *Shipston,* 200 N. Y. S. 479, 481; 206 App. Div. 55 (1923), it was held:

> "Where a coal jobber, owning no mines, contracted to deliver to buyer a definite amount of coal, shipments to commence at once, it was the jobber's duty, when it made the contract, *to place itself in a position to fill it* and the

fact that subsequent extraordinary conditions made performance difficult, did not justify nonperformance or cancellation, citing:

Maryland D. & C. Co. v. *U. S.*, 241 U. S. 189, and many cases. See also, *Snare & T. Co.* v. *U. S.*, 43 Ct. Cl. 364, 367.

Merchants Bank v. *Acme L. & M. Co.*, 160 Ala. 435, 442.

One may sell his goods to whom he pleases and prescribe exactions in regard to the price of reselling, etc., without changing the character of the transaction as a sale rather than an agency.

Rawleigh v. *Trerice* (Mich. 1923), 195 N. W. 79, 81.

Where defendant did not contract to sell plaintiff any particular lot of cotton, he could have performed the contract by purchasing similar cotton on the market and making delivery to plaintiff.

Cooper v. *Clute* (N. C.) 93 S. E. 915.

See also, *Krauter* v. *Simonin*, 274 F. 791.

Cohen v. *Morneault* (Me.), 114 A. 307.

White Walnut C. Co. v. *Crescent C. & M. Co.*, 162 Ill. App. 353, 358.

Christy v. *Stafford*, 22 Ill. App. 430, 435. (Aff'd 123 Ill. 463.)

Sanborn, et al. v. *Benedict*, 78 Ill. 309, 315.

In an action for breach of a contract, to buy cocoanut oil, where defendant failed to give shipping instructions and to furnish a bank credit, as agreed, it was not necessary for the plaintiff, in order to show readiness to deliver the oil, to establish that he had it in stock; defendant's breach of contract, excusing further performance by plaintiff, of whom was required only such readiness, as was necessary to enable him to

make delivery, at the time fixed for delivery, such oil being obtainable in the market at the time fixed for delivery.

Krauter v. *Simonin,* 274 F. 791, 793.

See also:

Dowling-Martin G. Co. v. *Lysle M. Co.,* 203 Ala. 491.
Saylor v. *United States,* 14 Ct. Cl. 453, 461.

In *Iron T. P. Co.* v. *Wilcoff Co.,* 116 A. (Pa. 1922) 150, 152, the Court laid down the general rule of damages for breach of contract of sale, and said (p. 152):

> "*Plaintiffs* vendee was not a party to the contract in suit nor mentioned therein; and while the rails in question were seemingly intended for him, *other like rails* would have filled his contract. The fact that a vendee has *resold* the goods contracted for is of no moment unless made a part of the contract; for, if not, he is entitled to the *benefit of his bargain regardless* of the disposition he may intend to make of the property involved. To hold otherwise would *inject collateral issues in trials for breaches of such contracts.*" (See also *Georgia M. O.* v. *Jones, et al.* (Ga. App. 1925) 126 S. E. 825.)

In *Raymond* v. *Phipps,* 215 Mass. 559, 562, it was held:

> "At the trial of an action for the breach of a contract to purchase milk from the plaintiff for a year, where it does not appear that the parties made any agreement as to the ownership of the milk, it is not material whether the *plaintiff had any financial interest in the milk that he was shipping to the defendant,* and the evidence on that question is not admissible."

A railroad company which performed its contract, to transport troops, is entitled to the full amount specified in the contract, without deductions, by reason of any claim by another railroad, *participating in* the *haul,* and without regard to any amount the United States may *have paid* the other railroad for so participating.

Cincinnati N. O. & T. P. Ry. Co. v. *U. S.,* 53 Ct. Cl. 25.

In *Kadish et al.* v. *Young, et al.* 108 Ill. 170, 186, it was held:

Where a party who has contracted to sell grain, to be delivered at a future time, for a given sum per bushel, before the time for delivery *buys* a lot of grain *to enable him* to deliver the amount sold, for which *he agrees to* pay one dollar a bushel certain, and *one dollar and twenty cents if he shall recover the contract price from the purchaser,* it was held, in a suit *against the purchaser* on refusal to receive and pay for the grain, that it in no manner concerned him how much appellee paid for the grain he bought, and that the parties from whom he bought the grain were not necessary parties appellee, as they had no privity of contract with the defendant.

In *Mendel* v. *Converse & Co.* (Ga. App. 1923), 118 S. E. 586, 587, it appears: the contract set up was a letter by seller to buyer, specifying the quantity, kind and price of goods to be sold, the time of delivery and payment. It was signed *by the plaintiff* as "Converse and Co., selling agents," and accepted by defendant. The Court held that although it might be that the plaintiff was a broker, as the phrase, "selling agents" would possibly imply, *in the transaction under consideration* it appears to have been acting for itself as a principal and not as a broker.

A corporation with power to buy and sell coal is liable under the statute, for mercantile tax on whole volume of its gross sales where it deals *directly with its customers, transmits* their orders *to operators,* who ship as directed, and bill coal to the corporation, which *bills it to its customers and collects,* assuming or guaranteeing payment of their bills at a *profit to it of a certain amount per ton* regardless of market fluctuations, as it is a *vendor* or dealer, *buying and selling on its own account and not an agent.*

Commonwealth v. *Thorne & Co.* (Pa.), 107 A. 814.

One, who has no privity of contract, in relation to a contract, signed by other persons, can neither sue nor be sued

merely because he has had some dealing with the subject matter of the sale through one of the parties to the contract resulting in detriment or benefit as the case may be.

Link v. *Durant G. & E. Co.*, 221 P. 482.

The fact that sellers did not own the goods *on the date* it notified buyer that unless shipping instructions were given within two days goods would be sold at buyer's risk, does not prevent a recovery by sellers where on that date they had a contract to purchase goods.

Moscahledes, et al. v. *Balboa T. Co.*, 199 N. Y. S. 38.

Where a party signed a contract of sale personally, and not as agent, it is *prima facie* the contracting party, unless it elsewhere appears in the body of the instrument that liability as principal is not to attach. A statement in the contract that the goods were sold on account of designated mills does not conclusively show that the seller's act as agent of the mills but might merely refer to the *source from which the goods were to come.*

Golden v. *Shaw*, 204 App. Div. 404.

When an agent *discloses* the name of his principal, if he signs a written contract in *his own name merely* which does not show *upon its face* that he was acting *as the agent* of another, he will be bound *personally* thereby. And the fact that the agent is known to be a commission merchant, auctioneer or other professional agent, makes no difference.

Wheeler v. *Reed, et al.*, 36 Ill. 81, 90.

Under statutes requiring a suit to be brought in the name of the real party in interest, the one *legally* entitled to the proceeds of the claim in litigation is such party.

Okmulgee Coal Co. v. *Hinton*, 218 P. 319.

So is the person with whom, or in whose name, a contract is made for another, and the beneficiary of the contract *need* not be joined.

Wilson v. *Hartford F. I. Co.*, 254 S. W. 266, 277.
Kelley Clarke Co. v. Leslie, 215 P. 699, 701.
Coe v. *Nebraska B. & I. Co.*, 193 N. W. 708, 709.
Harris v. *Clayton*, 199 P. 776, 778.
Mechem on Agency (2nd Ed.), Sec. 2,028.
Gray & Co. v. *Cavalliotis*, 276 F. 565, 567.

When a landlord agreed to furnish a tenant with supplies to make and gather a crop, and the landlord procured a merchant to furnish such supplies, the landlord would be liable to the merchant for such supplies.

Campbell v. *Shackleford* (Ark. 1923), 247 S. W. 1054.

In *Phez Co.* v. *Salem F. U.* (Or.) 201 P. 222, 232, it was held:

Where a fruit company agreed to sell fruit to buyer, and *several* fruit growers, by *independent* contracts, agreed with *company* to deliver fruits *grown* by *them* to *buyer*, a *release* of one of the fruit *growers* from his contract, by the *buyer and* the company, did *not release* the *other* fruit growers from *their contracts.* (See also *Ranney-Davis M. Co.* v. *Shawano C. Co.* (Kas. 1923) 306 Pac. 337, 340.)

It seems plain from the foregoing authorities that although appellee may have been merely a factor or other agent as to the three mining companies designated in its letter of August 6, 1920 (R. 23-24) and whose mines were named in Schedule "A" of the contract (R. 25), yet as to the appellant it must be held to have been a principal. It is no concern of appellant what relations appellee sustained to the mining companies nor what interest it had in the profits or commissions to be derived from the sale of coal to appellant under the contract.

IV.

If appellee under the contract is only a factor or agent for the three mining companies named in the letter of August 6, 1920, it can nevertheless recover all the damages suffered by it and the mining companies in an action in its own name, which damages are the difference between the contract price of coal and its market value at the date of repudiation (or breach) or delivery.

RIGHT OF A FACTOR TO SUE AND COLLECT IN HIS OWN NAME.

Generally on this point see the following cases:

Evans, et al. v. *Pisterino* (Mass. 1923), 139 N. E. 848, 851.
Morgan Bell (La.), 4 Mart. (O. S.) 615, 619.
Grinnell v. *Schmidt*, 4 N. Y. Super. Co. (2 Sandf.) 706, 708.
Ladd v. *Arkell*, 37 N. Y. Super. Ct. 35, 39.
Whitehead v. *Potter*, 26 N. C. 257, 264.
Williams v. *Bugg*, 10 Mo. App. 585.
Gorum v. *Carey*, 1 Abb. Pr. 285.
Huot v. *Osler* (R. I. 1922), 118 A., 871, 872.
25 Corpus Juris, Sec. 15, p. 350.
Slack v. *Tucker*, 23 Wall. 321, 330.
McCobb v. *Lindsay, et al.*, Fed. Cas. No. 8, 704; 2 Cranch C. C. 215.

As a general rule, since a factor has from the nature of his employment a special property in the goods—he may maintain an action in his own name against a *third* person *either for a breach, or enforcement, of a contract* made by him relating to the goods, or for the purchase price of goods sold by him, especially where there is an *express promise to pay him;* and may control such litigation where there is nothing to show such control is contrary to the wishes of the prin-

cipal. He may maintain such action whether the name of the principal is disclosed or not.

25 C. J. Sec. 133, p. 408-409.

Upon *an express promise to pay the factor of any one* for the use of the principal, the factor may maintain an action in his own name.

Van Staphorst, et al. v. *Pearce,* 4 Mass. 257, 262.

See cases under III of this argument.

Here the appellant expressly promised to pay appellee. There is no promise, or suggestion in the record, of paying, or of an intention to pay, any of the mining companies mentioned, or anyone else. (R. 30.)

Factor may collect all damages.

In *Smith & Son* v. *Bloom,* 159 Ia. 592, 597, the Court said:

> "Counsel for appellee contends that plaintiff cannot maintain this action for the reason that it was acting for another, and is not the real party in interest. * * * The alleged contract of sale was made between plaintiff and defendant. * * * It may be that as *between* plaintiff and its principal *there would be a duty* on plaintiff's part to account to the principal for any recovery *herein, if that has not already been done.* Plaintiff is a factor, and *as such, unless there is some objection* on the part of its principal, or *unless the principal intervenes, may sue in his own name and recover damages for a breach of the contract,* or to recover the purchase price." The Court cites numerous authorities and resumes: "*Defendant could look to plaintiff individually for performance of the contract; this liability being reciprocal defendant is liable to plaintiff for its performance. In contemplation of law plaintiff is,* under the facts here shown, *the real contracting party to whom the promises of defendant were made, and who is entitled to enforce them* (p. 598) * * * it does not appear *when* plaintiff paid the shipper * * *Furthermore, that was a matter *between plaintiff and its principal and no affair of the defendant.*"

See also *Robinson Norton & Co.* v. *Corsicana C. F.*, 124 Ky. 435, 441.

Cooper's Glue Factory v. *Devoe*, 178 Ill. App. 298.

A factor may, in his own name, recover the damages, resulting from a breach of contract, by the buyer, from him, *although he may be bound to pay the same when recovered* to his consignor, the measure of damages being the difference between the contract price for the goods and the value thereof on the day of the breach. He has a special property in the goods.

Groover v. *Warfield*, 50 Ga. 644, 654.

In the above case, after holding as above, the Court said:

> "The Court, in the charge, to the jury, *limited* the plaintiffs' right of recovery 'to the amount of damages *actually sustained by themselves.*' This may have misled the jury, and probably did. As heretofore stated, although the plaintiff *might be bound* to pay over to the owners of the cotton *whatever they recovered* in the suit, less their commissions on the same, they yet were entitled to maintain the action for the *whole amount of damages* occurring from the breach of the contract. *Their commissions would be but a small percentage of this.*"

In the above case the commissions were about 2 per cent.

In *U. S. Telegraph Co.* v. *Gildersleve*, 29 Md. 232, 246, it was held that where an agent is interested as for commissions, or by reason of special property in the subject matter, and the contract in reference thereto is made in his name, it is perfectly competent for him to sue and maintain an action in his own name as if he were the principal.

This is so in the case of a factor, or a broker, or a warehouseman, or carrier, an auctioneer, a policy broker, whose name is on the policy, or the captain of a ship for freight. So where a contract *is in terms* made with an *agent personally*, he may sue thereon; and if an agent in his own name carry

on a business for his principal, and appear to be the proprietor, and sell goods in the trade as such apparent owner, he can sustain an action in his own name for the price.

In this case a *broker* by telegraph, *in his own name*, sent an order for the purchase of gold, *on behalf* of *his principal*, which the telgraph company *failed to transmit*. It was held that the broker could sue the company in his own name on the contract to transmit the order, and *recover the full amount* of damages resulting from a breach of the contract. But that he sues as trustee for his principal.

U. S. Telegraph Co. v. *Gildersleve*, 29 Md. 232, 246, was cited and approved in *Camp, et al.*, v. *Gress*, 250 U. S. 308, 320.

The case last mentioned also cites approvingly, *Letterman* v. *Charlottesville L. Co.*, 110 Va. 769, 772, which holds that when the agent sues "he is entitled to recover the *full measure of damages* in the same manner as though the action had been brought by the principal,' citing many authorities.

In *Camp, et al.* v. *Gress*, 250 U. S. 308, 320, the Court cites with approval the leading case, *Groover* v. *Warfield*, 50 Ga. 644, 654, and other cases, and says (p. 320):

> "The contention appears to rest upon a misapprehension of the plaintiff's position. The contract recited that Gress *owned* the mill, and that the *title only* was in the Morgan Lumber Company. * * * There was not a particle of evidence that any other person had any interest of any kind in the corporation or its assets. Consequently, whether Gress entered into the contract *technically* on his *own behalf*, or *technically as agent* for the corporation, his undisclosed principal, is *immaterial. In either case*, the suit is one brought by him *individually;* in *either case all the loss suffered* through defendant's breach of contract is *recoverable by Gress; in either case* the *measure of damages is the same.* There is *no* basis for the contention that an *accounting and settlement of the Morgan Lumber Company's affairs was necessary in order to determine the amount of plaintiff's loss.*"

It is no defense to an action by a factor to recover the price of goods sold, that the sale was made by factor's agent without authority from the factor's principal, as such objection could be raised *only by the principal.*

Harralson v. *Stein,* 50 Ala. 347, 349.

A factor may sell the goods of *several principals* mingled together, and he *alone* sue for the price or damages under the contract.

Appellee sold to appellant an *entire* gross quantity of 150,000 tons of coal for the *entire* total price of $1,012,500 which appellant *promised to pay appellee.* The coal was to come from three specified mines in specified proportions, each owned by a designated distinct mining corporation. On this branch of the case it may even be assumed that the White Ash mine was the mine of appellee, since the mining company operating it and appellee had the same president.

A sale of a "*whole quantity*" of wood of three or four *different kinds*" at an *agreed* price," is "*one indivisible* bargain," although the delivery was to be by car loads until all had been delivered, instead of in bulk.

Fullman v. *Wright & C. W. C. Co.,* 196 Mass 474, 476.

In the above case it was also held that parol evidence was admissible, as to the situation of the parties, to show the intention of the parties and the meaning of the language they used in their written contract. (p. 477.)

Under the course of dealing between appellee and the mines it represented, and its contracts with them, it had express as well as implied authority to combine in one contract with the appellant, the sale of the several quantities of coal from the different mines designated in the latter contract.

Rozema v. *National C. Bank, etc.,* 292 F. 913, 915.

See also:

Chicago v. *Sheldon,* 9 Wall. 50, 54; *Missouri P. R. Co.* v. *Holt,* 293 F. 155, 162.

If a factor, under an entire contract, for a gross sum, sells goods, some of which belong to himself and some to his principal, the *principal cannot* maintain an action against the purchaser for the value of his goods.

Roosevelt v. *Doherty*, 129 Mass. 301, 303.

In the above case, the Court reviewing the authorities said:

> "A factor also may, and often does, sell the goods of different principals in one sale, and has authority to take a note for the whole sum from the purchaser, and may hold the note for the benefit of his principals. * * * So a factor may sell his own goods with those of his principal, and take a note which includes the amount due for both."

And on *page* 304, the Court pointed out that "in the case at bar" the factors were "dealers," as well as

> "selling agents for the plaintiff, and they could sell their own goods with those of the plaintiff, in the same manner as they could sell the goods of *several consignors together*. Having authority to do this, and thus mingle the plaintiff's goods with their own, they may make *an entire contract* with the purchaser for the goods *so mingled*. And this contract being *entire*, the remedy, *as against the* purchaser, must be *upon the contract itself*. The character of the contract *precludes* the plaintiff from suing separately for the value of his glass, *to the same extent* as he would have been precluded if a note had been given by the defendant in payment for the goods sold to him under the written contract."

In respect to the taking of a note the Court had previously said (same page):

> "The principal is thus *deprived* of his *direct* remedy against the purchaser for the *separate* price of his goods."

And this was held to be true "although his goods were sold for a *definite sum, capable of being ascertained*, and which forms a *distinct part* of the consideration of the note."

> "Where the right sued upon is *legal*, the holder of the *entire* legal title is the *only necessary plaintiff*. Since no

one else can sue afterwards, the defendant is protected by the judgment or decree, and that is the *only concern* which he can have. This is indeed the reason why the point is never good except in abatement."

Wesson v. *Galef*, 286 F. 621, 623.

See also

Weber v. *Columbia Amusement Co.*, 160 App. Div. 835, 837.

Redfield v. *Nat'l P. Co.*, 191 N. Y. S. 794, 796.

In *Buckmaster* v. *Williams* (Colo. 1923), 212 P. 977, the Court held that unless the right to sue be put in issue by special plea, the question is *waived*.

31 Cyc. 171.

"The general issue or general denial admits plaintiff's *authority* and capacity and the *character in which he sues.*"

31 Cyc. 207.

"The general denial does not perform the functions of a plea in abatement."

1 Ency. Pl. & Pr. p. 827.

"The general issue admits not only the competency of the plaintiffs to sue, but to sue in the *particular action* which they bring."

Justice Story in Society, etc. v. *Town of Pawlet*, 4 Pet. 480.

See also:

Standard F. Co. v. *Holstrom*, 104 N. E. 872, 875.

Bromley v. *Ferguson*, 202 P. 706.

Cook v. *Korshak*, 301 Ill. 603, 607; 134 N. E. 49.

Texas & P. R. Co. v. *Lacey*, 185 F. 225, 227.

Seymour v. *DuBois*, 145 F. 1003, 1007.

If appellee had joined with it in its petition, the three operating companies named in the contract, there would have been a misjoinder of parties and causes of action, since all three causes of action would not affect all the parties plaintiff, only appellee having an interest in all of them. (*Roberts*

v. *Utility Mfg. Co.* (N. C.) 106 S. E. 664; *Roosevelt* v. *Doherty*, 129 Mass. 301, 303.)

Appellee was a principal to appellant to the same extent that appellant, and not some contracting or purchasing officer, because mentioned in the contract, was a principal. Appellee's relations to one or more coal companies or the rest of the world have no place in this litigation. But call appellee a factor and the same result and the same damages will follow.

Counsel for appellant assert that the mines mentioned in the contract never produced the quantity of coal which appellant was obligated, but refused to take, under the contract. It is a fair inference that the Court in its opinion on the first trial followed this assertion. There was no such evidence in the record but all the evidence was to the contrary, although it is not included in the findings of fact of the Court of Claims in its final opinion. But at any rate this is immaterial.

(Note: The payroll figures for the three mines in question during the period from January 1 to March 1, 1921, vary little from the figures for the period from September 1 to December 31, 1920, inclusive. (Rec. in Court of Claims 581.)

The evidence is undisputed that when operating coal mines in southern Illinois lacked orders, they loaded coal on railroad cars and sold it on the market while in transit or while "rolling." In such a situation a coal operator consigned the coal to itself at some central point like Chicago.

The mines being without storing facilities to hold the coal when mined, were forced to either sell it on the open market in this manner at prevailing prices when there were no orders, or else close down the mines entirely or reduce the working force. See Note, p. 69 hereof.

It may well be added here that if the coal had not been produced, appellant was to blame. It gave no shipping orders and provided no cars.)

V.

The Court of Claims had jurisdiction. The appellee under the contract and the facts in this case was not confined to the measure and amount of damages prescribed in the arbitration and stipulated damages clauses of the contract. These stipulated or liquidated damages clauses, if enforcible, should be treated as providing for a penalty.

1.

IT WAS NOT THE INTENTION OF THE PARTIES THAT APPELLANT SHOULD HAVE THE RIGHT TO TERMINATE THE CONTRACT IN THE PUBLIC INTEREST AT ITS OPTION.

There was no intimation by the appellant in the negotiations leading up to the proposal of August 6, 1920, that appellant intended to reserve any right of revocation. There is no reference to the subject in the proposal itself, nor in any of the correspondence which passed between the parties. Even when Lieutenant Barr and Major Stayton were writing appellee concerning the lack of space for the coal, and requesting suspensions of shipment, no mention will be found of any such right reserved to, or claimed by, appellant. It was never asserted in the many later interviews between the representatives of the parties.

The agreement of the appellant to furnish extra railroad cars for the coal, is an illustration of the exceptional terms of this contract, which was made in times of distress and emergency. It was the distinct understanding that all the coal would be taken to the last pound. (Rec. 22, 31, 33.)

The correspondence and facts set out in the findings of the Court of Claims indicate there was a full discussion of the terms of the proposed contract, and especially as to quantity and times of delivery. When the representatives of ap-

pellant came to appellee to solicit a coal contract, appellee was averse to dealing with appellant because of appellant's red tape and slow payment. (Rec. 23.)

The letters of August 6, August 24 and September 7, 1920 (Rec. 24), and Schedule A of September 10, 1920 (Rec. 25-27), are in substantial harmony, and disclose no purpose of investing appellant with a right to annul the contract in the public interest, or for any other reason. There is no expression of such a reserved right.

Schedule A, and the letter of September 27, 1920, in point of time, are the last contemporaneous written expressions of the parties as to their understanding, and the letters of August 6 and August 24, 1920, their first.

It was held in *Robinson* v. *Stow*, 39 Ill. 568:

> "While it is not the province of courts to interpolate new terms into contracts, against the evident intention of the parties, with the view of making such contracts more reasonable, yet on the other hand, even a strained construction of the language will be adopted for the purpose of preventing obvious injustice.
>
> The intention of the parties, it is true, must govern, but this intention is not to be sought merely in the apparent meaning of the language used, but this language may be enlarged or limited, by reference to the circumstances surrounding the parties, and the objects they evidently had in view."

We ask the Court to turn back to *Sandford Ross, Inc.* v. *U. S., supra,* and *Mueller* v. *United States, supra,* decided by this Court, and *Harvey* v. *United States, supra.*

The Courts are not inclined to view printed contract forms with the same sanctity as other written contracts.

In *United Machinery Co.* v. *Etzel,* 89 Conn. 336, it appears that the contract of sale was written on a printed form containing a clause that if the property was rejected, *or* if payment was not made as stipulated, the purchaser "shall at once *return* and *deliver* * * * the property" to seller. The

only portion of the contract that was *written* into the printed form (aside from that describing the property) was a *promise* of the purchaser to *pay within thirty days after delivery.* The Court held that (p. 340):

> "The *printed* portions of the contract should be construed, *so far as their language will reasonably permit consistently with the unqualified promise* of the defendants to pay within thirty days * * * (p. 341) * * *. Here we construe the *printed* form when taken in connection with the defendant's *written* and unqualified agreement * * * as not containing any such option on the part of the vendee." (Option of *vendee to return property.*)

The Court held also that it was "doubtful whether" other "provisions of the *printed form* were *intended to have any application.*"

See also

Interior L. Co. v. *Becker-Moore P. Co.*, 273 Mo. 433, 438, 441, 443, 446, 449.

Montgomery Enterprises v. *Empire T. Co.* (Ala. 1920), 86 So. 880, 885.

In the present case after the parties had made their contract, consisting of the proposal of August 6, 1920, and the acceptance of August 24, 1920, they immediately began performance under it. As has been seen, this was a valid contract.

If all the printed parts of the contract should be treated as inapplicable and rejected there still remains Schedule A in typewriting, the letter of September 27, 1920, and also the written proposal of August 6, 1920, and the written acceptance of August 24, 1920.

Construing the first two documents together we have a written contract not only complete in all details but in harmony with the last two under which the parties had been acting for nearly two months.

The last letters considered alone also constitute a complete, valid contract, although a later formal contract was intended.

See *United States* v. *Speed,* 8 Wall. 77, 83.

Appellant is estopped to assert its claimed right of cancellation by its whole course of conduct.

2.

ASSUMING THE CONTRACT GAVE TO APPELLANT, AND IT PROPERLY EXERCISED THE RIGHT OF TERMINATION, THE GENERAL AND ORDINARY RULE AS TO THE MEASURE OF DAMAGES APPLIES.

It is very clear that if the provision in Section 2, of Article 9, authorizing termination of the contract by appellant, did not become a part of the contract between the parties, that the dependent clauses of that section providing for adjustment, settlement, arbitration and stipulated damages, were not intended to be embraced in their agreement.

Assuming that appellant's cancellation letters of March, 1921, were in complete compliance with the conditions of an existing right of termination, which was part of the contract, it is claimed that appellee's measure of damages was the difference between the contract price and market price on the day of delivery or cancellation (repudiation).

Appellant never paid, protected or reimbursed appellee after performance under the contract ended, nor offered to. The parties never determined by agreement, the facts to be determined under Subdivisions (*b*) and (*c*) of Section 2, of Article 9, of the printed portion of the contract (Rec. 10, 11), nor did either of them, offer to agree upon such facts, or appoint, or offer to appoint a person to make such determination. This was an executory contract.

A contract becomes executed only when it has been performed according to its terms; until this has been accomplished it remains executory.

State v. *Associated P. Co.,* (Ia.) 192 N. W. 267.

There was no possible way to liquidate appellee's damages under Subdivisions (*b*) and (*c*) of Section 2, of Article 9, of this contract, unless the parties either agreed on the necessary facts to be determined, or unless each party selected a person, who, with the person chosen, by the other, and with a third person, nominated by both, should agree upon such facts.

The Court will notice that at least one possible contingency is left out of calculation. The two persons selected by the parties might not agree on a third person. The provision for *stipulation of damages* is dependent on *such* agreement for a board of arbitration, or committee of settlement, *as well as* on the cancellation provision and its exercise.

If the parties neither agreed nor offered to agree on the basic facts for payment and reimbursement to appellee, and failed to select other persons to agree for them, the only reasonable construction of their actions is that they abandoned or revoked the arbitration provision. (Assuming still it was part of the parties' contract.) The elimination of the arbitration clause carries with it the dependent stipulated damage clause.

The Court, even upon the above assumption, should not hold that because the appellant might have relied upon said subdivisions, but failed to do so, that their rights are the same as if they had.

Amedon v. *Gannon,* 6 Hun. (N. Y.) 384.

Appellee is entitled to resort to the usual measure of damages. Appellant by its acts and omissions, abandoned and waived the stipulated damage clauses, and it is also estopped to invoke it. There are no disputes and controversies, and no steps were taken by either party to submit anything to the Secretary of War. The authorities are harmonious, decisive and overwhelming.

There was no intention that the United States should escape all liability for damages if by its acts or failures to act, it delayed performance on the part of the contractor, as recited in Paragraph 8 of the contract, or if it canceled the contract under Section 2, of Paragraph 9 thereof.

Paragraph 8 (R. 9) reads that in the former event the Government "*shall make payments* to and *protect* the contractor * * * in the same manner as provided in Section 2," of the Cancellation Article.

In case of cancellation, Section 2 (R. 10) provides: "(*a*) The United States *shall pay to the Contractor*"—not the mining companies; "(*b*) The United States *shall reimburse the Contractor*"—not some other corporation; "(*c*) The United States *shall* protect the *Contractor*"—*not third persons.* "(*d*) *The United States shall also pay to* the *Contractor*"—not as factor or agent.

The arbitration features are as follows:

"(*d*) The facts to be determined under the above Subdivisions (*b*) and (*c*) shall be determined by agreement between the Contractor and the Contracting Officer, and in event of their failure to agree, shall be determined by three persons," one to be appointed by each, "and the third by these two." (R. 10, 11.)

Nothing is here said about *notice or request* for such appointments or arbitration, or about bringing or not bringing action within any particular time, or depriving the courts of jurisdiction.

There is no provision that a *majority may determine the facts.*

No time is stated when these appointments are to be made, or within what time, or when either the parties, or the three selected persons, are to, or attempt to, agree, determine or act. It is a naked, indefinite agreement.

(*d*) Provides that: "As soon as *conveniently may be done after* such termination of this Contract," appraisers chosen in the same way shall determine by appraisement the "fair market value" of the *plant facilities, etc.,* and there follow provisions for apportioning the value of the *plant, etc.,* to the extent of the performance of the contract, which further requires that "The amount so fairly and properly apportionable shall be determined by agreement between the Contractor and the Contracting Officer, *if possible* and in the event of their failure to agree" etc. (R. 11.)

The further objection to (*d*) is it seeks to substitute the appraisers and subsequently the arbitrators for Court and jury.

The language of (*d*) which then follows shows more clearly the attempt to oust the Courts of jurisdiction. It reads: "In the event of the termination of this Contract under this Section 2, *any and all obligations* of the United States to *make any payments* to the Contractor under this contract, other than those specified or provided for in this Section 2—shall at once cease and determine."

Nothing is said in words about liquidated damages or a penalty.

If all obligations cease and determine, there is no liability. Courts cannot give judgment for damages if there is no liability. This last clause assumes to settle all questions of obligation or liability for the courts in reference to *future,* not existing, disagreements or controversies. It is against public policy for anyone in this manner to barter away *future* rights.

The original petition in this case was filed (R. 1) *April 26, 1922,* more than one year after the contract was formally repudiated (or canceled) and no step was taken under Section 2 of Article 9 thereof.

The appellant is estopped to interpose the arbitration clause after this time when it did nothing. Appellant aban-

doned, revoked and construed this clause just as appellee did. It is dead if it every existed. Appellee in addition, revoked it *by bringing this suit. Paulsen* v. *Manske,* 126 Ill. 72, 80; *Cocalis* v. *Nazlides,* 308 *id.* 152, 158; *Crilly* v. *Renn Co.,* 135 Ill. App. 198.

Where a contract provides that in case of liability by one of the parties to the other, that the parties ascertain or agree upon the damages, but that if they cannot agree they shall select appraisers or arbitrators, and the party *liable makes no effort to agree* with the injured party, but demands appraisers or arbitrators, the latter party may begin action on the contract without appraisement or arbitration.

Boyle v. *Hamburg-Bremen F. I. Co.,* 169 Pa. 349, 357; 32 A. 553.

Under a clause in a contract providing for arbitration either party may demand arbitration, and it is the right of either party to waive it. A party who makes no such demand must be presumed to have waived it. When neither of the parties avail themselves of the right to arbitrate, it must be deemed waived by both. The party who admittedly is liable for some damages—that is at fault—should make the demand.

Hutchinson v. *Liverpool, etc., Ins. Co.,* 153 Mass. 143, 147.

Wright v. *Susquehanna Ins. Co.,* 110 Pa. St. 29.

Hamilton v. *Insurance Co.,* 136 U. S. 370. 385.

Insurance Co. v. *Pulver,* 126 Ill. 329.

Unless an agreement for arbitration provides by its terms that no action shall be maintained on the contract, of which it is a part, until after an award, the agreement submitting the amount of damages to arbitration is collateral and independent, and a breach of this agreement cannot be pleaded in bar to an action on the principal contract. But

even when an arbitration and award is a condition precedent to bringing an action, it may be waived.

Hamilton v. *Insurance Co.*, 136 U. S. 370. 385.
Lesure Lumber Co. v. *Insurance Co.*, 101 Ia. 514, 522.
Insurance Co. v. *Pulver*, 126 Ill. 329.
Schrepper v. *Rockford Ins. Co.*, 77 Minn. 291, 295.
Grand Rapids F. I. Co. v. *Finn*, 60 O. St. 513, 524.
Cocalis v. *Nazlides*, 308 Ill. 152, 156, 158.
Jones v. *Brown*, 171 Mass. 318, 324.
Nurney v. *Fireman's F. I. Co.* 101 Ia. 514, 522.

An agreement the evident intent of which is to submit all disputes relating to the performance thereof to the final decision of a tribunal constituted by the parties themselves, the arbitrators both to assess damages and *to determine whether there have been any* violations of the agreement, and their decision in all matters to be final, is illegal and void.

Mentz v. *Armenia F. I. Co.*, 79 Pa. St. 478, 480.
Furnvall v. *Coombes*, 5 Mann. & G. 736.
Insurance Co. v. *Morse*, 20 Wall. 445, 451.
Muttenthal v. *Mascagni*, 183 Mass. 19, 23.
Cocalis v. *Nazlides*, 308 Ill. 152. 156, 158.
Miles v. *Schmidt*, 168 Mass. 339.
Jones v. *Brown*, 171 Mass. 318, 324.
Guaranty, etc. Co. v. *Green Cove, etc. R. R. Co.*, 139 U. S. 142.
Hamilton v. *Insurance Co.*, 136 U. S. 370, 385.
Lesure Lumber Co. v. *Insurance Co.*, 101 Ia. 514, 522.
Insurance Co. v. *Morse*, 20 Wall. 457.
White Eagle L. Co. v. *Slawek*, 296 Ill. 240.

An arbitration clause in a contract for final settlement of disputes and controversies does not apply where there is not merely a dispute in carrying out the contract, but a substantial repudiation of it by one of the parties. Such a clause may be waived by the conduct of both or one of the parties.

The Atlanten, 252 U. S. 313, 316.
Watts v. *Connors,* 115 U. S. 353, 360.
Boyle v. *Hamburg-Bremen F. I. Co.,* 169 Pa. St. 349, 357.
Am. F. I. Co. v. *Stuart, et al.,* 38 S. W. 395, 396.
Cocalis v. *Nazlides,* 308 Ill. 152, 156, 158.
Norton v. *Gale,* 95 Ill. 533.

A provision of a construction contract making the decision of the engineer conclusive as to certain matters, does not apply to a decision based on a misconstruction of the contract. In such case it is never final.

Dock Contractor Co. v. *City of N. Y.,* 296 F. 377, 386.

See also

American Fire Ins. Co. v. *Stuart, et al.,* 38 S. W. 395, 396.

In *Lesure Lumber Co.* v. *Insurance Co.,* 101 Ia. 514, 523, it was held: That provisions in a policy for an appraisal by arbitrators if there is a disagreement as to the loss and "an award by appraisers when the appraisal shall be required," "and that no action on the policy can be maintained without a full compliance *by the insured* with all the *foregoing requirements*" do not make an appraisal a condition precedent to the right to sue, where the company makes no demand therefor. The Court said:

> "An appraisal was not asked by either party to the policy. It was not therefore 'required' within the meaning of the provisions quoted."

An agreement to refer to arbitrators to be chosen in the future, if there is a dispute as to the loss under a contract is revocable.

Mentz v. *Armenia F. Ins. Co.*, 79 Pa. St. 478.

See also

Silver v. *Western Assurance Co.*, 33 App. Div. 450, 452.

In *Cocalis* v. *Nazlides*, 308 Ill. 152, 156, 158, the Court held:

"Arbitration by agreement of parties as a method of settling disputes was recognized at common law, and an award was enforcible by an action at law and a proper case could be enforced by specific performance in equity, but equity would not specifically enforce an agreement to submit a controversy, *and until an award was made the authority of the arbitrators was subject to revocation by either party except when the reference to arbitration was by a rule of court.*

To authorize a submission to arbitration there *must be an existing controversy* between the parties but it is not necessary that there be an existing legal cause of action.

An agreement to submit to arbitration any disputes that may arise *under an executory contract is void as it deprives the parties of their right to resort to the courts,* which are provided by the constitution for the redress of grievances and the settlement of disputes."

Many of the cases turn on the question of a waiver of the arbitration clause. *After the contract between the parties was at an end, whether by expiration of time or annulment under its terms, the rights of the parties were fixed and the clause forbidding a waiver except in writing as well as the rest of the contract expired.* Either party could *then waive any existing right.*

In *Ames C. Co.* v. *Dexter S. Co.* (Ia. 1922), 190 N. W. 167, 169, the Court reviewed the authorities and said:

"The right of a party to a mere naked agreement for submission of a controversy to arbitration, to *revoke it*

at any time before decision has been reached or an award made is recognized by the weight of authority."

Harlev v. *Sanitary Dist.*, 107 Ill. App. 546, 560, 569.

After a contract has been broken the remedy is regulated by law and not by the contract.

Hall v. *People's M. F. I. Co.*, 6 Gray. 185.

Stephenson v. *Piscataqua F. M. I. Co.*, 54 Me. 70.

In *Schrepfer* v. *Rockford Ins.*, 77 Minn. 291, 294, it appears that the plaintiff refused to enter into an appraisal on the demand of the defendant. Subsequently plaintiff offered to do so but the defendant refused, "so that, as the trial Judge remarks, *both parties* stand, so far as the present question is concerned, *precisely as if no provision for arbitration had been in the policy.*"

"Every citizen is entitled to resort to all the courts of the country and to invoke the protection which all the laws or all those courts may afford him. A man may not barter away his life, or his freedom or his substantial rights * * *. He cannot bind himself *in advance* by an agreement, which may be specifically enforced, thus to forfeit his rights and on all occasions, whenever the case may be presented."

Insurance Co. v. *Morse*, 20 Wall. 445, 451.

In *First Ecclesiastical Soc.* v. *Besse* (Conn. 1923), 119 A, 903, 905, 906, the Court reviewed the cases and said:

"But it is undisputed as these cases demonstrate that a stipulation to submit such matters of future disagreement in a manner specified by whatever name it may be called, is *not of the substance* of the contract, but is *merely an incident* included in the contract to determine auxiliary incidental or ministerial questions which are considered as possible or likely to arise. Moreover it has been generally held that while such an agreement is valid, *it is not binding* and irrevocable as long as *it remains executory* and has not been through to an award or decision."

The Court held that there was no bar to the action and pointed out that plaintiff had waited two and a half years for the money due.

47 L. R. A. (N. S.) 337, 350, 352, 354, 358, 400, 406, 412, 423, note.

In *Williams* v. *Branning Mfg. Co.*, 154 N. C. 205, it was held that an unexecuted agreement to arbitrate all disputes which shall arise in the execution of a contract both as to liability and loss is no bar to a suit upon the contract since it is void as an attempt to oust the courts of their jurisdiction.

The power of arbitrators is like a power of attorney, a mere authority and hence revocable.

Dixon v. *Morehead, Addison* (Pa.) 216.

The power of the courts cannot be barred by making the submission irrevocable or the award final and conclusive.

47 L. R. A. (N. S.) 402 note.

Where a policy of insurance against a loss by fire provides that "loss or damage to property totally or partially destroyed unless the amount of such loss or damage is agreed upon between the assured and the company, shall, *at the written request of either party,* be appraised and determined by disinterested and competent persons," etc., *no appraisal and award* of the loss or damage are *essential to a recovery* for the same unless a written request of one of the parties is first made. Such request is a condition precedent to such appraisal and award.

German-Am. Ins. Co. v. *Steiger,* 109 Ill. 254, 256.

See also

First Ecc. Soc. v. *Besse* (Conn. 1923) 119 A. 903, 906,

Mayer v. *Sun Ins., et al.,* 176 P. Stat. 579, 587.

Wright v. *Susquehanna M. F. I. Co.,* 110 Pa. St. 29.

In *Wright* v. *Ins. Co.*, 110 Pa. 29, 36, a similar arbitration clause was construed. The Court said:

> "It was the right of either party to demand arbitration; it was the right of either party to waive it, and the defendant having made no such demand, must be presumed to have waived it." Quoting (p. 36) *German-Am. Ins. Co.* v. *Steiger*, 109 Ill. 254, 256. See also: *Hutchinson* v. *Liverpool*, 153 Mass. 143, 147. Citing above cases (express *oral* waiver.)

See also

Boyle v. *Insurance Co.*, 169 Pa. 349, 357.

And finally under this head (V) appellee says it never owned coal mines or a "plant" and never claimed to. It represented and financed coal mines. Appellant dealt on this basis. The stipulated damages clauses, from the language used, could not have been intended to liquidate damages or become part of the contract. "In contracts for the sale of *staple* commodities on the breach of which damages may be accurately and readily ascertained, a sum stipulated to be paid on such breach will be regarded as a penalty unless it is *absolutely* clear that liquidated damages were intended." Corpus Juris, Vol. 17, Sec. 253, p. 956.

See

Lampman v. *Cochran*, 16 N. Y. 275, 278.
Seidlitz v. *Auerbach*, 230 N. Y. 167, 173.
Colwell v. *Lawrence*, 38 N. Y. 71, 74.
Ill. Surety Co. v. *United States*, 229 Fed. 527, 530.

While appellant in its brief in this court has made no argument on the points discussed under *this head*, appellee has deemed it necessary to present the foregoing discussion.

CONCLUSION.

When a commodity, like coal, which is subject to wide or sudden trade fluctuations in price is the subject of a contract, time is of the essence, and the life of the contract should be limited to the time fixed therein.

Weishut v. *Layton,* 93 A. 1057, 1060.

Hull C. & C. Co. v. *Empire C. & C. Co.,* 113 Fed. 256.

See *Jung Brewing Co.* v. *Konrad,* 137 Wis. 107, 119.

In *Hoyt* v. *Tuxbury, et al.,* 70 Ill. 331, 339, it was held that time may be implied as an essential element in a contract from the nature of the subject matter. If the thing sold be of greater or less value, according to the effluxion of time, then time is of the essence of the contract, and must be observed in equity as well as at law.

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